Office - Supreme Court, U. S.
FILED
APR 3 1942
CHARLES ELMORE CROPLEY

In The

Supreme Court of the United States

No. 1106

OTTO REFIOR,

Petitioner,

v.

LANSING DROP FORGE COMPANY, a Michigan Corporation, EMIL M. REFIOR, EDWARD H. REFIOR, and ALVA M. CUMMINS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

ALEXANDER H. SCHULLMAN,
McLEOD, FIXEL & FIXEL,
Detroit, Michigan,
Attorneys for Appellant.

NATIONAL LAW PRINTING CORPORATION, 4429 Field Avenue, Detroit, Michigan
PLaza 7117

SUBJECT INDEX.

	Page
Reasons why writ should be allowed	5
Certificate	9
Statement of matters involved	10
General statement	10
Specific statement	15
The January 8, 1941, reference	16
Re petition of Griffin, Heal and Emery for attorney fees, and consequent order restraining petitioner's trial counsel from trying petitioner's case	17
Questions presented	22
Assignment of errors	23

Cases Cited.

Swan Land & Cattle Company v. Frank, 148 U. S. 603, 612 ..... 5, 22, 23

Olsen v. Muskegon Piston Ring Company, 117 Fed. (2) 162 ..... 5, 22, 23

In The

Supreme Court of the United States

No. . . . . .

OTTO REFIOR,

Petitioner,

v.

LANSING DROP FORGE COMPANY, a Michigan Corporation, EMIL M. REFIOR, EDWARD H. REFIOR, and ALVA M. CUMMINS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Otto Refior, of Pittsburgh, Pennsylvania, pursuant to Section 240 (a) of the United States Judicial Code as amended February 13th, 1925, prays this court for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review the final opinion, order and decree of that court entered January 5, 1942 (R...).

Said opinion, order and decree affirmed a decree of the United States District Court for the Eastern Dis-

trict of Michigan in which the plaintiff's suit in this case was dismissed with prejudice, and petitioner says that he has been denied due process of law under the Fifth Amendment to the Constitution of the United States, for the following reasons:

I.

Because said order and decree dismissed petitioner's suit on the merits, although said suit was not tried on the merits, and no ground was shown for a dismissal on the merits.

II.

Because United States District Judge Frank A. Picard, before whom said cause was heard, had a fixed opinion adverse to petitioner and his case, prior to the taking of testimony, by reason whereof, he was disqualified to hear said case, and his decree should have been reversed in order to permit an actual trial of the issues, by another District Judge.

III.

Because plaintiff's application for time to file an affidavit of prejudice was denied by said District Judge; and thereafter when an affidavit of prejudice was filed, said District Judge struck the same from the record and declined to give recognition thereto.

IV.

Because the said District Judge, Frank A. Picard, restrained petitioner's trial counsel from proceeding with the trial of the case, and later permitted petitioner's trial counsel to withdraw from the case at the moment trial was to begin, all without petitioner's consent; and at the same time ordered petitioner's nonresident general counsel to proceed with the trial, although said nonresident general counsel had left the detailed preparation for trial of the case to the local trial counsel hired for that purpose and so advised the court; whereupon the trial court ordered the trial to begin within a week, and stated that he would enter an order for a bond which would have dissolved said restraining order; and failed to enter such order; and left said restraining order undetermined; and left petitioners in the position where an undetermined proceeding interfered with petitioner getting trial counsel to take his case, while at the same time, the trial judge ordered petitioner to proceed with the case. A serious and complicated situation resulted, leaving petitioner without adequate time to get to a determination on the restraining order, on the bond to be filed, on hiring new local trial counsel, on preparing the case for trial, and on questions involving possible disqualification of the District Judge, and when petitioner could not promise to go ahead with the trial before said judge in a week, petitioner's suit was peremptorily dismissed on the merits and without a trial. These proceedings were unjust and oppressive, and deprived petitioner of due process.

V.

Because said Circuit Court of Appeals affirmed the decree of dismissal on the ground that defendants had been diligent and that the petitioner had been dilatory, in bringing the case to trial.

No issue had been raised as to who had been diligent or dilatory and no opportunity was given to present evidence on any such issue. No intimation was given in advance that any such issue was to decide petitioner's rights on the merits.

A dismissal of petitioner's case on the merits on that point, without issue framed, evidence taken, or notice or knowledge that that was an issue in any form, deprived plaintiff of his property without due process of law.

VI.

Because United States Circuit Court of Appeals, 6th Circuit, erred in failing to apply this court's rule as laid down in its decisions and in place thereof applied its own rule which had no application.

REASONS WHY WRIT SHOULD BE ALLOWED.

1. The Circuit Court of Appeals for the Sixth Circuit has decided a federal question in a way in conflict with applicable decisions of this court.

Petitioner filed an affidavit of prejudice. It was held to have been filed too late because it was not on file ten days before the date set for the trial, notwithstanding the fact that the trial court's prejudice did not crystalize until proceedings had on the day the trial was to proceed. The affidavit was stricken from the files. Petitioner should have been given a reasonable time to obtain a transcript and to prepare and file his affidavit of prejudice, which was denied to petitioner. By reason thereof petitioner did not have due process of law within the meaning of the Fifth Amendment to the Constitution of the United States.

2. Because the said United States Circuit Court of Appeals for the 6th Circuit declined to apply the rule of this court as laid down in *Swan Land & Cattle Company v. Frank, 148 U. S. 603, 612,* and on the contrary, applied its own rule laid down in *Olsen v. Muskegon Piston Ring Company, 117 Fed. (2) 162,* although the latter rule had no application in the case at bar.

3. The Circuit Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the United States District Court for the Eastern District of Michigan, as to call for this court's power of supervision. The petitioner had the right to have his suit heard by an impartial court whereas the

United States District Judge before whom petitioner's suit was to be heard and decided, had a fixed opinion as to petitioner, adverse to petitioner, and had prejudged petitioner's case, had prejudged petitioner, and had prejudged petitioner's general counsel, all adversely to petitioner and before trial, and thereupon summarily dismissed petitioner's case with prejudice, with the result that petitioner did not have due process of law within the meaning of the Fifth Amendment to the Constitution of the United States.

4. The United States Circuit Court of Appeals for the 6th Circuit affirmed the District Court's decision, notwithstanding the District Court had taken proceedings which were unduly prejudicial to petitioner's rights and proceedings which were unjust and oppressive, in that said District Court (A) restrained petitioner from having new trial counsel proceed with trial, until petitioner would pay a large sum of money on a disputed claim for fees then in litigation; (B) then ordered a bond in lieu of said money payment; (C) did not settle the form of the bond; (D) left the matter of trial counsel for the trial of petitioner's case, in confusion; (E) at the moment trial was to begin, permitted petitioner's trial counsel who were ready for trial, to withdraw without petitioner's consent; (F) then ordered the case to go to immediate trial; (G) and after protest by petitioner, gave petitioner a week's time to go to trial, although there were eleven major matters to prepare for trial, and said court left the matter of the restraining order, cash deposit, bond, and new trial counsel unsettled, and still left petitioner helpless to get other trial counsel, and then immediately ordered dismissal of petitioner's suit because petitioner could not, under the circumstances, promise to go ahead with the trial before said District Judge in a week. By reason whereof petitioner did not have due

process of law within the meaning of the Fifth Amendment to the Constitution of the United States.

5. The United States Circuit Court of Appeals for the Sixth Circuit in affirming the lower court's decision dismissing petitioner's case with prejudice, held that such prejudice would be inferred. The court said "actual injury may either be shown or inferred from the lapse of time if the lapse be great." Prejudice to defendant was then inferred by the court from lapse of time during the pendency of the suit. No such inference was justified on the facts.

Furthermore, the record shows that the petitioner, himself, was trying every means to bring his case to trial. Under such circumstances the pendency of the case at bar over a period of years would not and could not raise an inference of legal prejudice to defendants, which justified a dismissal, and certainly not a dismissal on the merits. Such dismissal on the merits was a denial of due process within the meaning of the Fifth Amendment to the Constitution of the United States.

6. Because the United States Circuit Court of Appeals, for the 6th Circuit, in affirming the District Court's decision, dismissing petitioner's suit *on the merits*, decided said cause on the basis of supposed delay in having the case tried, when that question was not a controversy on which evidence was called for or submitted, or on which there was notice to petitioner that such an issue was being considered by the court, as a basis for dismissal of petitioner's suit on the merits.

Under such circumstances, petitioner did not have that reasonable opportunity to meet the supposed issue involving the question of diligence or dilatory action, and a dismissal of petitioner's suit on the merits deprived petitioner of due process of law.

Transcript of the record in this case including the proceeding in the said Circuit Court of Appeals for the Sixth Circuit is furnished herewith in accordance with Rule 38 of this court.

Wherefore petitioner prays:

That this honorable court grant a writ of certiorari directed to the United States Circuit Court of Appeals for the Sixth Circuit, requiring that court to certify full and complete transcript of the record and proceedings in the above entitled cause to this honorable court for its review and determination.

Eastern District of Michigan—ss.

Otto Refior, being duly sworn, deposes and says that he is the petitioner in the foregoing petition for writ of certiorari;

That he has signed said petition; and that the facts therein stated are true.

Otto Refior.

Subscribed and sworn to before me

this.....day of March, 1942.

....

Notary Public,
Wayne County, Michigan.

My commission expires.....

ALEXANDER H. SCHULLMAN,
McLEOD, FIXEL & FIXEL,
Attorneys for Appellant.

CERTIFICATE.

We hereby certify that we are the attorneys for the petitioner herein, Otto Refior; that the allegations of fact contained in said petition are true and that said petition in our opinion is well founded in law as well as in fact, and is presented in good faith.

ALEXANDER H. SCHULLMAN,
McLEOD, FIXEL & FIXEL,
Attorneys for Appellant.

STATEMENT OF MATTERS INVOLVED.

GENERAL STATEMENT.

Lansing Drop Forge Company is a Michigan manufacturing corporation, with an authorized capital stock of $125,000.00 Common shares and $55,000.00 Preferred shares.

Petitioner, Otto Refior, and defendant, Emil M. Refior, each own one-half ($62,500.00) of the Common stock of the Lansing Drop Forge Company. Defendant, Edward H. Refior, holds $55,000.00 worth of the Preferred stock of the Lansing Drop Forge Company. (His right to hold this stock for his own use is disputed.) Petitioner resides in Pittsburgh, Pennsylvania, and defendants reside in Lansing, in said Eastern District of Michigan (R. 2).

Petitioner's suit was brought in the District Court of the United States for the Eastern District of Michigan, on the ground of diversity of citizenship (R. 2). Petitioner's suit is to recover losses sustained by the corporation and by himself through mismanagement and through alleged misappropriation of corporate funds by the individuals named as defendants (R. 2).

The defendants, Emil M. Refior and Edward H. Refior are the managing directors (R. 2, 3), and defendant Alva M. Cummins is acting as the secretary of the corporation (R. 41). Although his election is alleged to be irregular R. (41).

Trial of the case was commenced in 1936 (R. 112), but only a limited amount of testimony was taken, when the case was postponed in order to first get certain accounting data (R. 113).

Due to the congested condition of the docket of the District Court of the United States for the Eastern District of Michigan (R. 114, 115), a trial date for the case was not finally set by the court until the close of 1940. There were several adjournments between the period from October, 1940 to March 1941, which adjournments were either for the accommodation of counsel on each side of the litigation or on account of the docket, or on account of the needs of the court (R. 114, 115).

On January 8th, 1941, the case was called and local counsel for petitioner verbally consented in court to a reference to a master for the taking of the proofs (R. 116). This was contrary to previous instructions of petitioner to the local counsel (R. 147, 152, 153), and as a result, petitioner caused an application to be filed to revoke the reference, and requested that the trial be had before the District Judge in open court (R. 80, 10).

While the proceedings relating to said reference were pending, the court issued a restraining order, restraining petitioner's trial counsel from acting further in the case, on the ground that another firm of lawyers, Griffin, Heal & Emery, who had previously worked on the case for petitioner, had filed a petition claiming that fees were owing to them (R. 97). A bond to the amount of the fees claimed by Griffin, Heal & Emery was thereupon filed by petitioner with the Aetna Casualty and Surety Company as surety, to await an adjudication as to said fees (R. 137, 138).

In the course of the proceedings on said Motion to revoke the reference, and on said fee matter, the trial judge made various charges against the petitioner and his counsel, among others, in substance that petitioner had deceived the court on the reference matter (R. 228, 229); had failed to pay his counsel (R. 153, 163); had substituted other counsel without paying for previous counsel (R. 153); was guilty of unethical conduct (R. 153, 163); had approved certain actions of petitioner's general counsel which included a charge that said general counsel tried to fool the court (R. 153); was guilty of sharp practice (R. 177); was unethical (R. 153); and had made a false statement of fact on a material matter to the court (R. 146, 147). These charges are denied by petitioner's general counsel and are denied by petitioner. These charges or other charges of dishonesty were repeated in substance at three different hearings. See May 12th, 1941, proceedings (R. 146), June 17, 1941, morning (R. 180), June 17th, afternoon (R. 197).

Thereupon the District Judge further stated that he had discussed the case with another District Judge and had unwillingly come to the opinion that the plaintiff did not want to try his case (R. 193).

There was no evidence to substantiate the charges made or the opinion formed.

Petitioner thereupon requested that the court disqualify itself (R. 177) but the District Judge declined do so (R. 177).

Thereupon an application was made by petitioner's general counsel for leave to file a comprehensive affidavit of prejudice and this application was denied (R. 177).

This motion was characterized as "sharp practice" (R. 177).

Thereafter petitioner's counsel filed an affidavit of prejudice (R. 201 to 213) and said affidavit of prejudice was stricken from the files by said District Judge (R. 222).

Petitioner says there was no basis for the dismissal of his suit with prejudice or for the dismissal of his suit at all.

Petitioner further says that the restraining order issued against petitioner's trial counsel, by which petitioner's trial counsel was restrained from proceeding with the trial, should have been dissolved and a necessary and suitable order in connection with the bond to be furnished to Griffin, Heal & Emery, should have been entered, so that petitioner could proceed with his case with adequate trial counsel and without the confusion and hindrance attendant on the existance of said restraining order, and an unsettled bond situation which prevented petitioner from hiring new trial counsel. The restraint and the unsettled bond made it impossible for petitioner to go ahead with the trial, and created a situation which was unjust and oppressve.

The District Judge dismissed petitioner's case "with prejudice" notwithstanding the case was not tried on its merits, and notwithstanding no legal prepjudice to defendants was shown.

The case was dismissed on the basis that defendants had been diligent and petitioner had been dilatory, when that was not a known issue in the case, was not a subject

of inquiry or evidence, and the District Judge's conclusion is not supported in fact, or on the record. Furthermore the parties themselves approved an order to the effect that, in case either side failed to go ahead on June 17th, 1941, the case would be treated as a default case (R. 121).

The United States Circuit Court of Appeals affirmed the District Court's decision dismissing the bill of complaint with prejudice.

STATEMENT OF MATTERS INVOLVED.

SPECIFIC STATEMENT.

The District Judge had a personal bias and prejudice against petitioner and adverse to petitioner, and that bias and prejudice disqualified the District Judge. That bias and prejudice took shape as a fixed opinion adverse to petitioner. That opinion appeared in four matters involved in petitioner's case as follows:

(1) January 8, 1941, reference to a Master to take testimony, and motion to revoke reference;

(2) March, 1941, petition of Griffin, Heal and Emery against petitioner, for fees claimed to have been earned by them, and a consequent restraining order restraining petitioner's trial counsel from trying the case;

(3) Denial to petitioner of the right to file an affidavit of prejudice in order to disqualify said trial judge, and

(4) The dismissal of the petitioner's case with prejudice without a trial on the merits, on the theory that defendants were diligent and petitioner was dilatory, when that was not an issue in the case, and no opportunity was given petitioner to prove he was diligent in trying to obtain a trial.

The January 8, 1941, Reference.

In the absence of petitioner and his general counsel the latter being a resident of California, petitioner's local trial counsel consented to a reference to a Master for the taking of testimony. This was contrary to local counsel's instructions. As soon as petitioner learned of this reference, his general counsel made a motion to revoke the reference for the reason that the case involves fraud issues and the credibility and veracity of the parties to the suit, and because the case is not such a case as should be referred under Rule 53-b of Federal Rules of Civil Procedure. Without hearing any evidence, the trial court said in substance:

(a) That petitioner's suit is vexatious (R. 193, 194).

(b) That petitioner had "had eight different firms of attorneys" at different times, with resultant delay of trial to be inferred (R. 163, 187, 188).

(c) That petitioner and his general counsel were guilty of improper practices (R. 147, 152, 153, 154).

(d) That petitioner had deceived the court (see statement of court R. 229, 230).

(e) That petitioner's counsel had not told the truth (R. 146, 147).

(f) That petitioner and his general counsel were guilty of a breach of ethics (R. 153, 197, 198).

(g) That petitioner condoned the alleged misconduct of his general counsel (R. 187).

(h) The District Judge then stated that he had discussed the case with another District Judge and that he had unwillingly arrived at the opinion that petitioner did not want to try his case (R. 193, 194).

The charges against petitioner are serious; they include fraud, unethical conduct, dishonesty and that petitioner's suit is vexatious. A litigant should not be required to try his case before a judge who entertains such opinions about the litigant.

On these facts, the District Judge was clearly disqualified to try the case, on the ground of prejudice.

Re Petition Of Griffin, Heal and Emery For Attorney Fees, and Consequent Order Restraining Petitioner's Trial Counsel From Trying Petitioner's Case.

The firm of Griffin, Heal & Emery had undertaken in writing to assume the responsibility of preparation and trial of petitioner's case. When the case had reached the point where it was about to be called for trial, said attorneys declined to accept the responsibility of the trial, compelling petitioner to hire other counsel, at additional expense. Petitioner had paid said Griffin, Heal and Emery a portion of their account. By reason of their breach of contract, he was obliged to pay other trial counsel for the preparation for trial.

(a) The District Judge restrained the new trial counsel from proceeding with the case (R. 97,98).

(b) Ordered a deposit of three thousand two hundred forty-five ($3,245.00) dollars cash, to cover any award of fees which might be made to Griffin, Heal & Emery by a court of competent jurisdiction (R. 97, 98).

(c) Petitioner requested permission to file a surety bond instead of depositing cash.

(d) Grffin, Heal & Emery consented that a bond could be substituted for the cash deposit, with the same terms that covered the order for the cash security (R. 164).

(e) A bond was filed by petitioner's counsel (R. 137) and it followed the conditions of the order of the court as previously made when the cash deposit was ordered (R. 97, 98).

(f) Although Mr. Griffin agreed in open court to accept such a bond, when the bond had been filed, he demanded changes (R. 168, 169).

(g) Petitioner consented to the desired changes, in open court (R. 175), whereupon the court said:

> "The court will prepare an order withdrawing that bond and substituting a new one in its place and clean it up so that there will be no question and that you will have this court hear it" (referring to this case) (R. 175).

(h) No such order was drawn by the court or entered by the court (R. 137, 138). The changes to go into the

substituted bond were never fixed by court order (R. 137, 138).

(i) Griffin, Heal and Emery thereafter did not accept the proposed changes and declined to accept the original bond (R. 212).

In the course of these proceedings on May 12, 1941, the court charged petitioner's counsel with "unfair" and "unethical" practices. We quote the record as follows:

> "The Court: * * * I didn't know at that time that you had resorted to what I thought were unfair ethical practices in not paying a local attorney and getting somebody else (R. 153).
>
> "Mr. Schullman: Now, I take issue again with the last remarks about the unethical situation" (R. 153).

The facts are that Mr. Schullman never hired any counsel for petitioner (R. 242). Petitioner himself had retained Messrs. Atkinson and Donnelly as trial counsel, after explaining to Mr. Atkinson what had taken place with Griffin, Heal and Emery and their alleged breach of their contract with petitioner.

The court further said:

> "All I am interested in is to know that clients can't come in this court and run from one attorney to another, and not pay the fellow they had in the first place" (R. 163).

The court in effect charged that petitioner had changed attorneys without paying his just obligations to them (R. 163), which charge is without foundation in fact. This

charge was based on the unproved allegations of the petition filed by Griffin, Heal & Emery, which allegations are denied under oath, by answer duly filed, on which there has been no trial (R. 198-202).

The court then granted permission to petitioner's new trial counsel, Messrs. Atkinson and Donnelly, to withdraw from the case (R. 178, 179), without consulting petitioner, and this took place at the moment set for the beginning of the trial of the case at bar.

The following colloquy also took place in proceedings had on June 17, 1941, the date of such withdrawal:

> "The Court: I can decide this case, although I prefer not to."
>
> "Mr. Schullman: Well, your honor, then in view of that, I ask that this court, in view of the remarks made to counsel and in view of the remarks with which counsel disagrees, I ask that the court disqualify itself from these proceedings, and I should like to, with the permission of the court, file a comprehensive affidavit setting forth everything that has occurred since I have been here in it" (R. 177).
>
> "The Court: The court denies the motion, and too, the court considers it another evidence of counsel's attempt to resort to what some people might call rather sharp practice" (R. 177).
>
> "Mr. Schullman: Your honor, may I merely take an exception to the last remarks made by the court as to sharp practices"? (R. 177).

A week's time was then offered to petitioner's general counsel who stated to the court that "the entire trial of

the case has been left at all times to local counsel and has been so left to Mr. Atkinson" * * * (R. 180).

The restraining order was not dissolved. Griffin, Heal and Emery did not O. K. the bond for the claimed fees. The court did not fix the terms of the new bond as the court stated it would do. The case was ordered to go to trial in a week, but was not put into a condition which would make it possible to hire trial counsel for such trial.

The restraining order and the bond situation presented procedural difficulties which stopped the hiring of new trial counsel. The trial of the case, with eleven major subjects of litigation, and questions related to the possible disqualification of the trial judge, also presented serious difficulties which prevented getting new trial counsel ready for trial in a week's time. When petitioner's counsel so advised the District Judge, the judge peremptorily dismissed petitioner's suit and dismissed it "with prejudice" although no legal prejudice to defendant was shown (R. 138, 139).

QUESTIONS PRESENTED.

First: Was dismissal with prejudice without any trial on the merits in the case at bar and without any evidence of prejudice, a deprivation of due process at law, under the circumstances in the case at bar?

Second: Did the United States Circuit Court of Appeals for the 6th Circuit, err in refusing to apply this court's rule as laid down in *Swan Land & Cattle Company v. Frank, 148 U. S. 603, 612,* and in place thereof applying a different rule as laid down in *Olsen v. Muskegon Piston Ring Company, 117 Fed. (2) 162.*

Third: Was the trial judge's order requiring that petitioner proceed to trial without his trial counsel, allowing said trial counsel to withdraw, and restraining the hiring of new trial counsel, so oppressive and unjust as to deprive petitioner of due process of law?

Fourth: Was the trial judge disqualified on account of bias against petitioner, so as to deprive petitioner of due process of law?

Fifth: Did the trial court deprive petitioner of due process, by striking petitioner's affidavit of bias and prejudice from the files and disregarding same?

Sixth: Was the court's decree, based on the proposition of diligence as between the parties, a deprivation of property without due process, there being no issue framed on the question of diligence, no testimony taken thereon, and no opportunity to meet any such issue?

ASSIGNMENT OF ERRORS.

Now comes the said Otto Refior, appellant in the above entitled cause and files the following assignment of errors upon which he will rely in the prosecution of the appeal herewith petitioned for in said cause, being an appeal from the decree of the United States Circuit Court of Appeals, 6th Circuit, entered on the January 5th, 1942:

1. That said court erred in affirming a decree in which the United States District Court for the Eastern District of Michigan, dismissed petitioner's suit with prejudice, when there was no trial of the issues on the merits and no legal prejudice to defendants, thereby depriving petitioner of his property without due process of law.

2. That said court erred in affirming a decree of the United States District Court for the Eastern District of Michigain, dismissing petitioner's suit with prejudice, which action was in conflict with the rule laid down by this court in *Swan Land & Cattle Company v. Frank, 148 U. S. 603, 612.*

3. That said court erred in affirming the order of the said United States District Court by which petitioner was ordered to proceed in a week before the said District Court or have his case dismissed; the said District Court had restrained petitioner from hiring trial counsel; said District Court then ordered a bond to dissolve said restraint, and after bond was filed, it was not approved so as to permit petitioner to hire trial counsel; and said District Court permitted attorneys who had been representing petitioner as trial counsel, to withdraw without petitioner's consent, whereupon when petitioner advised the court that he required more time than a week to

clear up questions relating to the restraining order, form of the required bond, the question of disqualification, and the hiring of trial counsel who could prepare eleven major issues in the case in time to begin the trial in a week, said District Judge dismissed petitioner's case on the merits without a trial or a hearing of the evidence. The affirmance of the decree of said United States District Court, deprieved petitioner of his property without due process of law.

4. That said court erred in affirming the order of the said United States District Court in striking petitioner's affidavit of bias and prejudice from the record when said affidavit should have been allowed to stand, and in refusing to order the District Judge to disqualify himself.

5. That said court erred in affirming the decree of the said United States District Court which District Court dismissed petitioner's suit on the merits, and decided said cause among other grounds, on the basis of supposed delay in having the case tried when that question was not an issue in the case; that no evidence was called for or submitted on that question, and no notice was given to petitioner that such an issue was being considered by the court as a basis for dismissing petitioner's bill of complaint on the merits, by reason whereof petitioner was deprived of his property without due process of law.

WHEREFORE, petitioner prays that said judgment may be reversed and for such other and further relief as to the court may seem just and proper.

ALEXANDER H. SCHULLMAN,
McLEOD, FIXEL & FIXEL,
Attorneys for Petitioner.

Dated March 28th, 1942.

SUBJECT INDEX.

	Page
Opinion	1
Jurisdiction	1
Statement of case	2
Specification of assigned errors	2
Argument	3-34
I. Petitioner was entitled to a trial in open court. Charges of wrongful conduct, based on his motion to revoke reference, were not justified	3
II. Due process entitled petitioner to a hearing before an impartial tribunal. The District Judge should have been disqualified	18
III. The restraining order, the judge's failure to fix the terms of the bond, and permission granted petitioner's trial counsel to withdraw at the last moment, coupled with order for petitioner to proceed to trial, was unfair and oppressive, and deprived petitioner of due process	23
IV. Dismissal of petitioner's case with prejudice, without a hearing on the merits or notice of such intended action, was a denial of due process	25
V. The United States Circuit Court of Appeals erred in failing to apply this court's rule laid down in Swan Land & Cattle Company v. Frank, 148 U. S. 603	28

VI. The affidavit of bias and prejudice filed by the petitioner against the trial judge was legally sufficient under Section 21 of the Judicial Code 29

Conclusion 35-36

Table Of Cases and Authorities.

Bishop v. United States, 16 Fed. (2d) 410 at 411 (C. C. A. 8—1926) 32
Brown v. Fletcher, 220 U. S. 611, 31 Sup. Ct. 715.. 27
Cook v. United States, 267 U. S. 517, 538..... 23
Cook v. United States, 267 U. S. 517, 530..... 18
Evans v. Superior Court, 290 Cal., pages 662, 666.. 19
Hearn v. Miller, 33 Pac. Reporter (2) Oklahoma, page 506 21
In Ex Parte American Steel Barrel Company, 230 U. S. 35 (1913) 34
In re Irving Austin Building Corporation, 100 Fed. (2) 574, 577 (C. C. A. 7)..... 3
Los Angeles Brush Manufacturing Company v. James, 272 U. S. 701, 47 Sup. Ct. 286..... 3
Morris v. United States, 26 Fed. (2d) 444 (C. C. A. 8—1928) 31
Murray v. HoBoken Land Company, 18 How. 276.. 18
Nations v. United States, 14 Fed. (2d) 507 (1926).. 31
Ocho v. Hernandez, 230 U. S. 139..... 18
Olsen v. Muskegon Piston Ring Company, 117 Fed (2) 162 29
Patting v. Spring Valley Coal Company (7th Circuit), 98 Fed. 812 27
People v. Lennon, 200 N. Y. App. Div. 510, 512.... 20
Pueblo, etc., v. Archieluto, 64 Fed. (2d) 812 (10th Circuit) 27

Shaw v. Birk (5th Circuit), 67 Fed. (2) 851..... 27
Shea v. United States, 251 Fed. 433 (C. C. A. 6).. 34
Swan Land and Cattle Company v. Frank, 148 U. S. 603 ..... 28, 36
Taylor on Due Process, page 472..... 18
Tegler v. State of Oklahoma, 130 Pac., page 1164, 1171 19
12 Am. Juris Pr., page 326, Sec. 635..... 18
12 Corpus Juris 1225, Sec. 1001..... 18

In The

Supreme Court of the United States

No. . . . . .

OTTO REFIOR,

Petitioner,

v.

LANSING DROP FORGE COMPANY, a Michigan Corporation, EMIL M. REFIOR, EDWARD H. REFIOR and ALVA M. CUMMINS.

BRIEF FOR PETITIONER.

OPINION.

Opinion was rendered in the United States Court of Appeals for the 6th Circuit on January 5, 1942 (R. . .) and is reported in *124 Fed. (2), page 440.*

JURISDICTION.

Statement of grounds on which the jurisdiction of the court is invoked is contained in Petition for Certiorari on pages 5-7.

STATEMENT OF CASE.

Statement of the case is covered in Petition for Certiorari on pages 10-22.

SPECIFICATION OF ASSIGNED ERRORS.

Specification of assigned errors which are intended to be urged is contained in Petition for Certiorari on page 23.

ARGUMENT.

I.

Petitioner Was Entitled To a Trial In Open Court. Charges Of Wrongful Conduct, Based On His Motion To Revoke Reference, Were Not Justified.

Petitioner was entitled to a trial in open court. His action in trying to obtain such a trial was not open to charges of wrongful conduct.

Rule 53-b which incorporates old Rule 46 of the Federal Rules of Civil Procedure requires that in trials in equity,

> "The testimony of witnesses shall be taken orally in open court except as otherwise provided by statute or the rules and that the court shall pass upon the admissability of all evidence offered as in actions at law."

This court held in *Los Angeles Brush Manufacturing Company v. James, 272 U. S. 701, 47 Sup. Ct. 286,* that the mere fact that the court docket is crowded is not such an exceptional condition as will justify a reference to a master in an equity case.

In re Irving Austin Building Corporation, 100 Fed. (2) 574, 577 (C. C. A. 7), the court said:

> "A fraud issue, ordinarily, is not a proper one

for reference to a special master. Perhaps it would be better to say, issues in fraud hearings are not the proper subject for reference to a special master, save in extraordinary and exceptional cases.

"And exceptional means the rare—the unusual case or circumstances. The rule is more than an academic pronouncement. It demands application."

• • •

"The evils of delay and added expense are both inherent in references."

The reference made by the court was a general reference and not a reference limited to questions of accounting (R. 78 to 80). The audits of each side were already prepared (R. 148, 154). The credibility of the witnesses was involved, including the credibility of the parties to the litigation. Fraud allegations are set up on one side and denied on the other (R. 1 and 40).

A hearing before the master would have been productive of much unnecessary expense and burden to the plaintiff.

The petitioner accordingly took a stand throughout the litigation (even though originally consenting to a reference in 1936 when defendants objected) that the case should be tried in open court (R. 147, 152, 156). Defendant's counsel as far back as 1938, knew this (R. 156).

In view of the established rules entitling petitioner to a trial in open court in the case at bar, petitioner did not merit the serious charges made against him by the District Judge, on account of his motion to revoke.

To summarize, the District Judge accused petitioner of committing a fraud on the court in getting a reference, of fooling the court, of dilatory tactics, of maintaining a vexatious litigation of condoning certain alleged wrongs committed by petitioner's general counsel as follows: Telling an alleged untruth to the court as to said reference, alleged breach of ethics, alleged sharp practice and semi-sharp practice, and giving the court the "run around." These charges of wrongdoing were without foundation in fact, and will now be referred to, in detail.

The hearing on motion to revoke reference was held May 12, 1941 (R. 147).

In opening the argument on the motion to revoke reference, petitioner's general counsel made the following statement:

> "The order, as I understand, was made without either the plaintiff or his general counsel being apprised thereof in advance, without an opportunity on our part to present facts against the making of the order" (R. 146, 147).

Thereupon the court said:

> "You might as well start off on the right foot. That is not true" (R. 147).

> "The Court: When the defendant found out I was going to be away during part of February and could not take the case on at that time, he consented to it. I thereupon suggested to the plaintiff, in view of the fact that he wanted this case referred, that he prepare the order of reference.

"The order of reference was not prepared, and then the defendant's counsel came to me and said they don't want to refer it now. I said, it is too late; it will be referred.

"So when you start out and say it was done without your consent, you start out on the wrong foot, and I would advise you to start out on the right foot with this court."

"Mr. Schullman: Now, in order to clarify the record, may I state, and with this court's indulgence, that we do not know what occurred here, but we do know this, that it was made without my consent as general counsel, it was made without the consent of plaintiff.

"Now, we contend that there are no facts in this case which either require a reference to a master or which can (R. 147) be considered exceptional within the decisions that have been handed down by the United States Supreme Court on this matter.

"This is an action wherein the plaintiff charges fraud in the misappropriation of funds, allegedly against the defendants. Two audits have been taken by both sides. They are completed. The audits are intermingled with the issue of fraud. We cannot extricate the audits, nor can we extricate the question of fraud.

"These are matters only and solely for a trial judge to determine.

"Furthermore, on the issue of fraud and the allegations, the plaintiff desires and wants a trial court who will have the opportunity of having first-hand observation of the parties involved, who will have to determine that issue of fraud" (R. 148).

"The Court: But start out with the right facts. You will find yourself in better grace with the court if you don't try to fool the court" (R. 153).

"Mr. Schullman: Your honor, we are not trying to fool the court, and the inference would be I personally suggested the master be requested" (R. 153).

* * *

"Mr. Schullman: We are not finding fault with them (referring to the local trial counsel), but we do say this, we have not only requested, I think my letters have always insisted upon one thing, and that is that at no time should there be anything but a trial by a judge; at no time" (R. 154).

"The Court: And I sent it to the Master at your request."

"Mr. Schullman: Your honor, I will have to specially individuate" (R. 152).

"The Court: Never mind getting into that, you can't play fast and loose with this court" (R. 152).

"Mr. Schullman: There was no authority given to any counsel at any time, but they had no right to deprive the plaintiff—in fact, it is my belief I had no right to deprive the plaintiff of a substantial right."

"The Court: All right. If I have made a mistake, if I should hear this case after sending it to the Master at your request, I am willing to be shown" (R. 152, 153).

The judge explained what he had in his mind in a statement dictated into the record on July 7, 1941, at which time he said that petitioner obtained a reference

(actually referring to local counsel who consented to a reference) until the court had left the city on a short vacation and as soon as the court had left, the petitioner made a motion to revoke the reference knowing that the motion would not come up for hearing until the court returned some weeks later; and the court further stated on the record that it was apparent, plaintiff was being dilatory in his tactics (R. 228, 229).

A charge that a fraud had been practiced upon the judge, that petitioner was guilty of dishonest conduct, that petitioner's general counsel was trying to fool the court, and that petitioner condoned these "tactics" (R. 187) is indeed serious for a litigant who has to appear before that judge in a case involving that litigant's credibility. How could petitioner reasonably expect to get an impartial hearing, when he is condemned in advance as a dishonest person, before any testimony has been taken?

The judge in advance of the trial, and with nothing to support his charges, stated in effect that the petitioner had fraudulently obtained a reference to a master, with a view to delay trial, and that petitioner had "fooled" the court. These charges were followed by other charges of dishonesty.

The District Judge then stated that he had discussed the case with one of his associate judges, and had unwillingly arrived at the opinion that petitioner did not want to try his case for some reason or other (R. 193, 194).

The record shows that said opinion of the court, was, in fact, a fixed opinion, and this is proved by the many other remarks indicating the same opinion expressed at other times.

We now refer to the Griffin, Heal & Emery matter, where the District Judge again made serious charges against the honesty of petitioner.

The Griffin, Heal and Emery Matter. Petitioner's Trial Counsel Was Restrained From Going Ahead With the Trial. Charges Of Wrongful Conduct On That Matter Were Not Justified.

In 1937, Messrs. Griffin, Heal & Emery had been retained by petitioner as local trial counsel (R. 95, 96). At a later date Messrs Atkinson and Donnelly became petitioner's local trial counsel. Petitioner had entered into a written contract with Griffin, Heal and Emery, which contract was contained in a certain letter dated April 1, 1937 (R. 95, 96).

According to the terms of the Griffin, Heal and Emery contract as contained in said letter, it was provided as follows:

> "It is expressly understood that you are to assume responsibility for the conduct of the preparation for trial and at the trial of the pending litigation, although I, of course, cannot expect you to guarantee the successful outcome thereof. Signed: Otto Refior."

These terms were accepted by Griffin, Heal and Emery in their letter of acceptance dated April 1, 1937 (R. 96).

When it came time for trial, the law firm of Griffin, Heal and Emery did not desire to undertake the trial by themselves, and breached their contract under which they had undertaken to try the case, and demanded that associate trial counsel be hired by petitioner to conduct the trial with them. By reason of these demands of Griffin, Heal & Emery, petitioner was obliged to hire other trial counsel. Whatever preparations had been made for trial by Griffin, Heal & Emery, were now valueless in view of the fact that petitioner's new counsel was obliged to make complete preparation of the entire case, with a consequent duplication of the work of preparation.

Petitioner rightly took the position that Griffin, Heal and Emery had breached their contract (R. 100) and that petitioner had a set-off against them for the full cost of preparation.

On April 29, 1941, when petitioner's suit was about to come up for hearing in the District Court, Griffin, Heal & Emery filed a petition in petitioner's suit, demanding payment of three thousand two hundred forty-five ($3,245.00) dollars in cash for alleged fees, and praying for an order restraining petitioner from using other trial counsel in his case (R. 90-97).

On April 29, 1941, the District Judge ordered petitioner to deposit three thousand two hundred forty-five ($3,245.00) dollars in cash, the amount claimed by Griffin,

Heal and Emery for services, "as security for any amount found to be due said attorneys for services under their contract with plaintiff as may be finally determined in a proper legal proceeding" (R. 98).

On April 30, 1941, the court entered its order restraining petitioner's new trial counsel, Messrs. Atkinson and Donnelly from further appearing in this cause as local counsel in behalf of petitioner (R. 97) pending deposit of said three thousand two hundred forty-five ($3,245.00) dollars. On May 12, 1941, Mr. Griffin agreed to accept a bond in place of the requirement of the cash deposit (R. 164). Mr. Griffin said:

> "Your honor has already entered an order in this case that he will deposit so much money. It is satisfactory to me in lieu of the money he put up a bond to comply with that order.
> The Court: All right" (R. 164).

Petitioner filed a bond which complied with the court's order (R. 137-138).

Notwithstanding the bond was filed in compliance with the court's order as to cash deposit, and pursuant to Mr. Griffin's agreement made in open court to accept a bond which would comply with such order, Mr. Griffin appeared in court on June 16, 1941, and took exception to the bond, and objected to having Atkinson and Donnelly go ahead with the trial as petitioner's trial counsel.

In the course of a colloquy had in open court, certain changes in the bond were demanded by Mr. Griffin and

those changes were designated as "a," "b" and "c," changes (R. 173, 174, 175). Petitioner conceded the changes.

Thereupon the court said:

> "The court will prepare an order withdrawing that bond and substituting a new one in its place and clean it up so that there will be no question that you will have this court hear it, and if it is to be a jury trial, I don't think I can settle that now" (R. 175).

The court did not prepare any order withdrawing the filed bond, and providing the changes to go into the new bond. The court did not prepare an order substituting a new bond in the place of the one on file. The matter was left without an order of any kind. The terms of a substitute bond not having been fixed by court order, it could not be filed, and it was not filed because the court saw fit to dismiss petitioner's case before anything further could be done to lift the restraint against new trial counsel in the case.

Thus the changes to be made on the bond were not fixed by court order, new bond could not be filed without the specific changes, no law firm could be engaged as new trial counsel, and the restraining order was not dissolved.

Adding to this confusion, the court then gave petitioner's trial counsel, Atkinson and Donnelly permission to withdraw from the case at a time, when the trial was to begin, (and without petitioner's consent (R. 179)

and ordered petitioner's nonresident general counsel to go ahead with the trial notwithstanding the court was advised that petitioner's nonresident general counsel had left the detail of the preparations for trial, to Atkinson and Donnelly (R. 180), who were ready.

In these proceedings the court said:

> "I didn't know at that time that you had resorted to what I thought were unfair unethical practices in not paying a local attorney and getting somebody else."
>
> "Mr. Schullman: Pardon me, your honor, you don't mean I—"
>
> "The Court: One minute it is you and one minute it is somebody else. * * * You didn't pay the other attorney but you got somebody else, and I don't know about that." * * *
>
> "Mr. Schullman: Now I take issue again with the last remarks about the unethical situation. I don't know whether this court has had the benefit of all the facts involved and that is not part of this argument" (R. 153).

At another stage of the proceedings the court said as to petitioner:

> "The Court: I don't care how you do it. All I am interested in is to know that clients can't come in this court and run from one attorney to another, and not pay the fellow they had in the first place."

"Mr. Schullman: If your honor would like to hear the facts on it very briefly—"

"The Court: Listen, I can't try his case" * * * (R. 163).

Bond had been filed which complied with the order for deposit of the cash (R. 137, 138).

Petitioner filed the bond with the court clerk before court closed on June 16, 1941, to comply with verbal order of the judge to have the bond on file that day.

The next day, June 17, 1941, Mr. Griffin objected to petitioner's trial counsel proceeding with the case until the "proper" bond is filed (R. 168).

No doubt the District Judge was trying to put petitioner's case into a condition which would allow it to be tried. But his proposed order fixing the terms of the bond was not entered, and that left the Griffin, Heal & Emery claim as a stumbling block which prevented petitioner from getting other trial counsel.

On the one hand petitioner was restrained. On the other hand, petitioner was ordered to go ahead with the trial. If petitioner went ahead, he was guilty of violating the code of ethics. If he didn't go ahead, he would be thrown out of court.

Again, petitioner's general counsel is resident in California, and is a practitioner in that state. He could not remain in Detroit, and go to Lansing and other points,

and hire experts in foundry and forge practice, and do those numberless things required in the preparation for trial, for the simple reason that preparation and prosecution of the case would involve some weeks, and petitioner's general counsel should not be penalized for his inability to move from California to Detroit to prepare this case for trial, for which task, he was always compelled to have local trial counsel. He had Earl Davis until Davis got sick. Miller, Canfield, Paddock & Stone temporarily took Davis' place and thereafter Griffin, Heal & Emery took over the case up to the point at which Atkinson & Donnelly prepared for the hearing. These attorneys acted as petitioner's trial counsel.

We submit it was an unjust and oppressive exercise of the lower court's powers, to order a nonresident general counsel from California, to proceed to trial, and particularly when Griffin, Heal & Emery had pending certain objections which might be applicable until the court fixed the form of the release bond.

Then at the session of the court held in the afternoon of June 17, 1941, the court charged petitioner with having had eight different firms of local attorneys which was not a fact (R. 188), and speaking to Mr. Schullman, petitioner's nonresident general counsel, the court said:

> "The Court: Well, Mr. Refior has borne with you through seven or eight firms of attorneys and I don't know as he wants to change his tactics now" (R. 187).

The court likewise in said afternoon session of court on June 17, 1941, stated to petitioner's nonresident general counsel:

> "You ask this court to disqualify itself, after this

court called you for what he believed to be a violation of the ethics of this court and I am mindful that some courts would not have been as lenient as this court with you" (R. 197, 198).

We shall summarize the charges of dishonesty made against petitioner, none of which is supported by the record.

1. That petitioner deceived the court (R. 147).

2. That petitioner did "run around from one attorney to another and not pay the fellow they had in the first place" (R. 153).

3. That petitioner's general counsel was guilty of "semi-sharp practice" (R. 168).

4. That petitoner's general counsel was guilty of "rather sharp practice" (R. 177).

5. That petitioner's counsel would find himself in better grace with the court if he would not try to fool the court (R. 154).

6. That petitioner's counsel could not play fast and loose with the court (R. 152).

7. That petitioner had borne with his general counsel through seven or eight firms of attorneys and "I don't know as he wants to change his tactics now" (R. 187).

8. That petitioner and his general counsel resorted to unethical practices (R. 153).

The foregoing are charges of dishonesty, of unethical practices and of sharp practice, committed or condoned.

These charges were a prejudging of petitioner, adverse to his honesty and his business ethics. The court's remarks were likewise a prejudging of the honesty and professional ethics of petitioner's general counsel adverse to that counsel and without support in the record.

The charges were serious, they were personal, and they constituted a fixed opinion of the court adverse to petitioner.

The fact that the court kept on repeating the charges of breach of ethics, and sharp practice, and deceit of the court, indicates in no uncertain way, that the court's adverse opinion of petitioner, was a fixed opinion.

That fixed opinion was formed before any evidence had been submitted by anyone. It was a prejudgment, and constituted bias and prejudice within the meaning of the law.

II.

Due Process Entitled Petitioner To a Hearing Before An Impartial Tribunal. The District Judge Should Have Been Disqualified.

1. The words "due process of law" as contained in the Fifth Amendment to the United States Constitution were intended to convey the same meaning as the words "by the law of the land" in Magna Carta. *Murray v. Hoboken Land Company, 18 How. 276; Ocho v. Hernandez, 230 U. S. 139.*

Perhaps no definition is more often quoted than that given by Mr. Webster in the *Dartmouth College Case*, "'By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.'" *Taylor on Due Process, page 472.*

> "The tribunal must be an impartial one." *12 Am. Juris Pr., page 326, Sec. 635.*

> "Due process of law requires a judicial determination of the issues by an impartial tribunal," * * * *12 Corpus Juris 1225, Sec. 1001.*

In *Cook v. United States, 267 U. S. 517, 530*, this court said in reversing the lower court's judgment of guilt:

> "There was marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion."

The record in the case at bar shows that the District Judge, in advance of trial, had a fixed opinion. We submit that that opinion disqualified him. The record clearly shows prejudice in the sense that the petitioner-plaintiff and his rights were prejudged. Prejudice here used, has to do with the court prejudging a litigant—with passing on the honesty of a litigant and the good faith of his suit, before the evidence is before the court—with passing on the case without reference to the evidence. Where a court has a fixed opinion in advance of the hearing, that court ceases to be an impartial tribunal.

In *Tegler v. State of Oklahoma, 130 Pac., page 1164, 1171*, the court said:

> "Prejudice means pre-judging of the case from any cause; it means a settled and fixed opinion either as to the guilt or innocence of an accused. One who has prejudged a person's guilt has a prejudice against such person. This is not necessarily an emnity or ill will against him. The statute excludes any person who had made up his mind or formed a judgment in advance in favor of either side. *Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 297.* Prejudice means prejudgment, judgment before hand."

In *Evans v. Superior Court, 290 Cal., pages 662, 666*, suits were filed against a number of individual defendants, in a group of actions for recovery of damages. After the first case had been completed the court made an order continuing the other cases. In the proceedings on making such order, the judge stated that there had been no wilful misstatement of fact on the part of any witness with the exception of the statements of John A. Evans and his brother. The trial judge stated that he was sat-

isfied from the evidence, that those two witnesses (the Evans brothers) had entered upon a course of dealings which would have done credit to a Captain Kidd. When the subsequent case against the Evans brothers came up for trial, upon the filing of an affidavit of prejudice, to disqualify the judge who heard the first case and made the above statements, it was held that the judge was disqualified to sit on the trial of the Evans brothers.

He had charged the Evans brothers with having made wilful misstatements. His charges were held to amount to an opinion about the Evans brothers and their dealings, and prejudged the Evans brothers. The judge was held to be disqualified.

In *People v. Lennon, 200 N. Y. App. Div. 510, 512,* one Watkins, was dismissed by a magistrate on a charge of disorderly conduct brought by a police officer named Lennon. After Watkins was released, Officer Lennon was placed under arrest because Watkins had been found to be covered with a mass of black and blue spots which gave evidence that he had been beaten by Lennon. Lennon was charged with assault and battery.

Patrolman Lennon was to have been tried by the same magistrate who discharged Watkins.

On the day that Watkins was discharged, the magistrate stated that he had found Watkins a mass of black and blue spots which gave evidence that he had been badly beaten and that Lennon and his co-officer had committed perjury on the trial of Watkins; the judge also stated that there was no question in the judge's mind that the prisoner had been assaulted and beaten by Lennon.

Lennon made a motion to have the magistrate disqualify himself on account of these statements. The motion was denied, the magistrate stating that he was able to decide the case impartially. On appeal it was held that the judge's remarks constituted a fixed opinion by the court which disqualified the judge from sitting on the *Lennon case.* The judge was accordingly ordered to disqualify himself.

In *Hearn v. Miller, 33 Pac. Reporter (2) Oklahoma, page 506,* the judge was held to be disqualified:

The court said in that case:

> "Without going into detail, the record clearly indicates such attitude of the respondent toward the petitioner as would cause any person similarly situated to entertain the gravest doubts of receiving that fair and impartial trial without bias or prejudice which is guaranteed to all persons in this state.
>
> "(2) While the respondent insists that he is not unfriendly to the petitioners, and he can afford a fair and impartial trial, and while we do not doubt his sincerity in this regard, yet the question is not so much whether he feels and insists that he would be able to give a fair and impartial trial, as it is whether his utterances and actions have been such as to preclude reasonable men from feeling that a fair and impartial trial, without bias or prejudice, could be had before him. The basic principle upon which the law rests is that every litigant is entitled to have his contentions heard and his rights determined by an impartial, unbiased and unprejudiced tribunal."

The Circuit Court of Appeals in the case at bar, characterized the trial judge's remarks as "irritation."

Charges of dishonesty, breach of ethics, fraud allegedly perpetrated on the court, and sharp practice, involve something more than irritation.

Charges of that character necessarily prevent the litigant so charged, from receiving an impartial trial before the court making such charges. This would be particularly true in the case at bar where petitioner's credibility will come into question, in deciding the case.

We submit that such charges made in advance of evidence or trial, disqualify the judge who makes them, for he is no longer an impartial tribunal.

The fact that some of the charges of the trial judge were made against petitioner and others were made against petitioner's general counsel, does not change the rule in the case at bar. The trial court said in effect that the petitioner had condoned his general counsel's alleged "tactics."

There was never time nor opportunity given to meet the charges made by the court.

There should have been a hearing and inquiry before condemnation.

We accordingly submit that the District Judge should have been disqualified, and the dismissal of petitioner's suit without a trial, violated petitioner's right to have an impartial judge sit on his case. Petitioner consequently did not have due process.

III.

The Restraining Order, the Judge's Failure To Fix the Terms Of the Bond, and Permission Granted Petitioner's Trial Counsel To Withdraw At the Last Moment, Coupled With Order For Petitioner To Proceed To Trial, Was Unfair and Oppressive, and Deprived Petitioner Of Due Process.

In *Cook v. United States, 267 U. S. 517, 538,* no opportunity had been given to the respondent to hear certain charges made by the District Judge, until the respondent came into court. This court held that due process of law required that the respondent should be advised of the charges, that he should have an opportunity to meet them, have the assistance of counsel if desired, the right to call witnesses, and to give testimony. None of these things were permitted to the respondent in that case.

This court in reversing the judgment in *Cook v. United States*, said "we think the procedure pursued was unfair and oppressive to petitioner."

In *Cook v. United States*, the petitioner's alleged wrongful act consisted of a personal letter written to the judge, and that letter was before the court. In the case at bar, there wasn't a scrap of evidence to sustain the charges of fraud, dishonesty and breach of ethics, made by the District Judge. In *Cook v. United States* this court held that the respondent was not given an opportunity to disprove the charges or explain them. So likewise in the

case at bar, there was no opportunity offered or given to petitioner, to disprove the charges which the court made against him.

A bond was ordered, and such bond as the order required, was furnished. Later, the party to be indemnified, asked for three changes in the bond and those changes were agreed upon. Thereupon the court stated upon the record that he would draw such an order as would be required to fix the exact terms of the bond (R. 175). But the trial judge never drew the order and consequently the exact changes in the terms of the bond were never fixed.

In the meantime, petitioner was restrained on the record from hiring other trial counsel and this left the matter of the protection of petitioner's litigation in serious confusion. While the District Judge intended that the restraining order should be dissolved by the bond, so far as any new trial counsel was concerned, the restraint was still of record.

The judge charged petitioner with running around and hiring lawyers without paying the ones he previously had, and ordered petitioner to proceed to trial represented by his general nonresident counsel, notwithstanding it was known by the court that the entire detail of the trial had been left to petitioner's local trial counsel, Atkinson & Donnelly.

Thereupon the District Judge excused petitioner's local trial counsel from acting further in the case, following a request on their part to withdraw after the District Judge made the charges against petitioner and his general counsel as alleged.

This action was one which, in the language employed by this court in *Cook v. United States,* created a situation unfair and oppressive to the petitioner. The remarks of the District Judge did not make for an impartial and calm judicial consideration of petitioner's case, and the judge's insistance that the petitioner go to trial under the circumstances here detailed, and proceed before him without his trial counsel, was a denial of due process to petitioner.

IV.

Dismissal Of Petitioner's Case With Prejudice, Without a Hearing On the Merits Or Notice Of Such Intended Action, Was a Denial Of Due Process.

Petitioner's nonresident general counsel, having left the detail of the preparation of the trial to the local trial counsel employed by petitioner for that purpose, advised the court that a week's time was wholly inadequate to proceed with the case. There was the unsettled situation with reference to the Griffin, Heal and Emery indemnity bond and the order restraining the hiring of other trial counsel; there was the question as to whether the trial judge was disqualified in view of his charges against petitioner and his general counsel; there were eleven major subjects involved on the merits in the litigation. There was also the need to find a suitable attorney who could undertake immediately the work of preparation and trial as and when the procedural difficulties were solved.

In the meantime the District Judge himself did nothing toward entering an order fixing the terms of the new bond demanded by Griffin, Heal and Emery. Until that order was entered, it was impossible to file the bond because Griffin, Heal and Emery had again changed their mind as to the terms, and until the bond was filed, the restraining order operated as an efficient restraint on petitioner in retaining new trial counsel.

The trial judge offered to permit petitioner's general counsel to proceed with trial, but Griffin, Heal and Emery did not voice approval or disapproval to this suggestion.

The court granted permission to Messrs. Atkinson and Donnelly to withdraw as petitioner's local trial counsel at the moment trial was to begin, without the consent of petitioner.

When petitioner's nonresident general counsel sought to explain that more than a week was necessary, and that it was impossible for petitioner to proceed in a week, and could not promise to proceed before the same District Judge, the judge dismissed petitioner's case with prejudice.

No evidence was taken as to any prejudice being suffered by the defendants. The District Judge said (R. 199):

> "I don't think that the witnesses have been put out. I suppose the fellow coming from Saginaw in coming down here will probably suffer a change of atmosphere; but people who come from Lansing ought to be tickled to death."

There was some talk about the Lansing Drop Forge Company being engaged on defense work, but the petitioner's lawsuit did not interfere with the transaction of that company's business, whether that business be war defense work or ordinary commercial work. There was no evidence offered to show legal prejudice to any of the defendants.

The parties approved an order setting this case for trial on June 17th, 1941, and the order provided that in case any party failed to proceed with the trial, that the case would be treated as a default case (R. 121).

This follows the rule in *Brown v. Fletcher* in which Certiorari was denied by this court, reported in *220 U. S. 611, 31 Sup. Ct. 715.* In that case, the United States Circuti Court of Appeals stated the rule that the proper course, where a plaintiff failed to go ahead with his case (and there was no reason shown for adjournment), "was to dismiss the action for want of prosecution."

This rule is also followed in:

Pueblo, etc., v. Archieluto, 64 Fed. (2d) 812 (10th Circuit);
Patting v. Spring Valley Coal Company (7th Circuit), 98 Fed. 812;
Shaw v. Birk (5th Circuit), 67 Fed. (2d) 851.

We submit that petitioner being without notice that his case was to be dismissed on the merits and having had no opportunity to frame an issue or to offer evidence for the protection of his rights, has not had his day in court. He has been denied due process of law.

The dismissal on the merits, when no trial was had and no evidence was offered to show legal prejudice to defendants, was not justified on the record nor was such dismissal justified in view of the court's order that the case would be treated as a default matter.

Under the circumstances the dismissal on the merits deprived petitioner of due process.

V.

The United States Circuit Court of Appeals Erred In Failing To Apply This Court's Rule Laid Down In *Swan Land & Cattle Company v. Frank, 148 U. S. 603.*

The parties in the case at bar, consented to an order made May 22, 1941, that June 17, 1941, be the date peremptorily set for trial, and that the case may be treated as a default case, as to any party who does not appear for trial (R. 121).

Under *Swan Land & Cattle Company v. Frank,* this court established its rule that it is the general practice when a bill of complaint is dismissed without consideration of the merits, to state in the decree that the dismissal is without prejudice.

Notwithstand the case at bar was to be disposed of, as a default case if a party failed to appear, the United States Circuit Court of Appeals sanctioned a decree of dismissal on the merits, on the basis of its own rule

in *Olsen v. Muskegon Piston Ring Company, 117 Fed. (2) 162.* The rule in that case cannot have application to the case at bar, because many facts were shown in that case, by testimony taken in open court, from which it appeared that large and serious loss would be entailed, if the nonappearing plaintiff were merely defaulted. There was no evidence of any such situation in the case at bar. No testimony was taken to support a dismissal on the merits.

Under these circumstances, this court's general rule was applicable to the case at bar, and the United States Circuit Court of Appeals erred in applying its own special rule as laid down in *Olsen v. Muskegon Piston Ring Company,* in the case at bar.

VI.

The Affidavit Of Bias and Prejudice Filed By the Petitioner Against the Trial Judge Was Legally Sufficient Under Section 21 Of the Judicial Code.

(1) The affidavit of prejudice was timely.

The Circuit Court of Appeals, in its opinion, supra, at page 444, stated:

> "A motion to disqualify a judge under Section 21 of the Judicial Code 28 U. S. C. A., Section 25, must be filed ten days before the beginning of the term, or as soon as practicable before the term begins, or if the disqualifying facts are not discovered before its beginning, as soon thereafter as practicable."

The affidavit of prejudice in this case was filed by the petitioner upon the discovery of the disqualifying facts as soon after June 17, 1941, as practicable.

It could not have been filed before June 17, 1941, since for the first time at those proceedings petitioner became convinced that the trial court had carried over its prejudice against him and his case. The Judicial Code, Section 21, recognizes good cause for the failure to file an affidavit of bias and prejudice less than ten days before or after the beginning of the term of court.

On its face, the affidavit presents good cause for the failure to file it not less than ten days before the beginning of the term or before the trial.

The affidavit of bias and prejudice filed by petitioner (R. 201) presents such good cause:

> "That he did not file this affidavit ten days before the beginning of the present term of court or ten days before the trial of this case, to-wit: June 17th, 1941, for the reason that the bias and prejudice of said judge did not crystallize and plaintiff's knowledge thereof did not become complete and clear until June 17th, 1941; that on several occasions prior thereto, plaintiff had requested his attorneys to prepare and file an application to disqualify his honor, Judge Frank A. Picard, from presiding at the trial of his case, but that said attorneys disagreed with plaintiff and advised him that whatever prejudice was evident against plaintiff and his cause would disappear from the mind of the judge at the trial of the case; however, on the 17th day of June, 1941, the matters and things hereinafter set forth occurred, clearly showing to the plaintiff that Judge Frank A. Picard had

carried over his prejudice against plaintiff; that on said date, June 17th, 1941, Alexander H. Schullman, counsel for plaintiff, requested that said judge disqualify himself and requested leave to file an affidavit for said purpose, which the court denied; plaintiff alleges that the absence of knowledge that the bias and prejudice would be carried over and would be evident on June 17th, 1941, is good cause for his failure to file said affidavit within ten days before the beginning of the term or before said date."

A leading case on the subject, *Morris v. United States, 26 Fed. (2d) 444 (C. C. A. 8—1928)*, recognized such good cause for delay in filing an affidavit of prejudice. At page 449 of the *Morris case* the court said:

"From the affidavit it appears that much of the matter and many of the facts recited were within the knowledge of the defendant, A. B. Morris, before a considerable time before the trial. The affidavit recites that on several occasions, defendant requested his attorneys to prepare and file application to disqualify the trial judge but that his attorneys disagreed with him (and it is inferable that defendant yielded to his counsel) until the 20th day of July, 1927, when affiant received new information which was imparted to his attorneys * * *."

The good cause presented in the *Morris case* is similar to the good cause presented in the instant petitioner's affidavit of prejudice, and we believe that the affidavit should have been adjudged legally sufficient.

To the same effect see *Nations v. United States, 14 Fed. (2d) 507 (1926).*

The trial court knew that he was charged with prejudice. Petitioner requested leave to file an affidavit therefor (R. 177), which was denied. An exception was taken to the final decree at the proceedings (R. 200) and said exception was specifically incorporated in the final decree (R. 138, 139).

Particularly in a case of this kind, when no trial on the merits has been had and when petitioner has been seriously aggrieved, good conscience and equity compel a recognition of the sufficiency and proper filing of the affidavit. It could not have been filed before June 18, 1941, since several days elapsed before the transcript was furnished; the remainder of the time was utilized in the preparation of a motion of the petitioner to set aside the decree of the court, in the preparation of the affidavit of bias and prejudice, and in attempting to secure local counsel to join in the filing of the affidavit of prejudice (R. 141).

We submit that the affidavit was and is legally sufficient, was properly filed, and that the trial court should have proceeded thereunder in accordance with Judicial Code, Section 21.

(2) The affidavit of prejudice should have been judicially recognized as sufficient in conformity with the intent and purpose of Judicial Code, Section 21.

In *Bishop v. United States, 16 Fed. (2d) 410 at 411 (C. C. A. 8—1926)*, a criminal case and dissimilar in facts, the court, in discussing the affidavit of prejudice, stated:

> "Every case is governed to a large extent by the particular facts thereof."

We submit that the instant case and the facts are dissimilar from every case on the subject that has come to our attention. In the various cases wherein an affidavit of prejudice was not entertained because of tardy filing, the objection was either to the interference with the court in the trial of the case or to the filing for purpose of delay.

The record in this case is conclusive that petitioner did not seek delay but desired trial of his case by a judge.

The matters covered by petitioner's affidavit of prejudice in the case at bar were within the knowledge of the trial court on June 17, 1941, and at all times until the actual physical filing.

On June 17, 1941, a motion for leave to file such an affidavit was made and denied (R. 177); the decree dismissing petitioner's case with prejudice was entered on June 18, 1941, incorporating petitioner's exception thereto (R. 138, 139) and said decree evolved out of and was the proximate result of the trial court's refusal to consider petitioner's charge of disqualification; on June 27, 1941, a motion to set aside and vacate the order dismissing the bill of complaint (R. 139-144) was filed, and referred to therein were details of the charges of prejudice against the court, the fact that an attempt would be made to secure local counsel (R. 144) and the fact that an affidavit of prejudice would be filed in advance of the hearing date of the motion (R. 144).

The cases cited by the Circuit Court of Appeals in its opinion are inapplicable to the facts in this case.

In Ex Parte American Steel Barrel Company, 230 U. S. 35 (1913), the judge had disqualified himself and the objection was to rulings made by a second judge who was assigned the case, the objection being that the second judge had no jurisdiction since the disqualification of the first judge was improper. The facts of this case are entirely dissimilar and inapplicable to the instant case.

In *Shea v. United States, 251 Fed. 433 (C. C. A. 6)*, Shea was convicted of a conspiracy to use the mails. The proceeding in the appellate court was brought to review a second conviction upon an indictment. The court said at page 435:

> "The affidavit was purposely held back and its use on the eve of trial resorted to for the purpose of securing a postponement."

In the instant case, the reason and need for the affidavit became manifest on June 17, 1941; oral request was made for leave to file such affidavit, and after the dismissal with prejudice, petitioner proceeded to secure transcript, prepare his motion to set aside the decree, and secure local counsel. This required time. Petitioner was diligent in the actual filing of the affidavit of prejudice and no injury resulted from the lapse of the few days required to draw the affidavit and file it.

We submit that the affidavit of prejudice was filed in this case as soon as practicable upon discovery of the disqualifying facts and therefore was properly filed.

CONCLUSION.

Petitioner was entitled to have his rights adjudicated by an impartial judge and not by a judge who has charged him with dishonesty, breach of ethics, sharp practice, and fraud allegedly perpetrated on the court (either committed by petitioner or condoned). These charges were not appealable rulings but were statements made at various times quite disconnected with any trial of the case. The record does not sustain the charges made.

Petitioner's Affidavit of Prejudice was prepared and filed as soon as transcript could be obtained and the necessary preparation made for its filing. No injury resulted to anyone from the lapse of a few days required for that purpose. Good and sufficient grounds were shown why the affidavit could not have been filed ten days before the term of the court. On the basis of said affidavit the District Judge should have disqualified himself and not having done so the United States Circuit Court of Appeals should have ordered his disqualification.

Petitioner was also seriously aggrieved by the action of the trial court which restrained petitioner's trial counsel from proceeding with petitioner's case and agreed to fix the terms of a bond which was to release the restraint, and failed to do so, and then permitted petitioner's trial counsel to withdraw at the last moment, and ordered petitioner's nonresident general counsel who had not prepared the detail for the trial, to go ahead with the trial, and still left the matter of the bond and restraint unsettled. Such action was unduly prejudicial to petitioner's

rights, was unfair and oppressive, and deprived petitioner of due process. The United States Circuit Court of Appeals should have reversed the decree of the District Court on this ground.

We submit that if petitioner's case was to have been dismissed at all (as it should not have been) then the rule of this court laid down in *Swan Land and Cattle Company v. Frank, 148 U. S. 603,* should have been applied by the United States Circuit Court of Appeals for the Sixth Circuit, and any such dismissal should have been without prejudice. There was no evidence whatsoever of legal prejudice to defendants, shown on the hearing. There were no facts from which such prejudice could be inferred. The petitioner was given notice by the court's order, that if he did not proceed, his case would be treated as a default case and such treatment under the rule in *Swan Land & Cattle Company, supra,* would require a dismissal without prejudice.

Petitioner had no such reasonable notice as the law requires, to permit him to meet a supposed issue on the question of dismissal on the merits, or for taking any needed testimony, or meeting any charges made by defendants or by the court against petitioner.

By reason whereof petitioner submits that he is entitled to a review by certiorari, of the said decision of the United States Court of Appeals for the 6th Circuit, and a reversal of that decree.

Respectfully submitted,

ALEXANDER H. SCHULLMAN,
McLEOD, FIXEL & FIXEL,
Attorneys for Petitioner.

APR 18 1942
CHARLES ELMORE CROPLEY
CLERK

No. 1106

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1941

OTTO REFIOR,

Petitioner,

vs.

LANSING DROP FORGE COMPANY, a Michigan corporation, EMIL M. REFIOR, EDWARD H. REFIOR and ALVA M. CUMMINS,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

CAPITOL PRINTING CO., LAW PRINTERS, DETROIT, MICH.

Index and Citations

	PAGE
Questions Presented	1
Statutes Involved	2
Statement	3-13
Argument	14-33
Discussion of Petitioner's Brief	33-40
Conclusion	40-41

Cases

Berger v. United States, 255 U.S. 32	29
Bishop v. United States, 16 Fed. (2d) 410	29
Brown v. Fletcher, 182 Fed. 963	37
Chafin v. United States, 5 Fed. (2d) 592	27
Cuddy v. Ottis, 33 Fed. (2d) 577	28
Ex Parte American Steel Barrel Co., 230 U.S. 35	25
Ex Parte Glasgow, 195 Fed. 780	25
Fieldcrest Dairies v. City of Chicago, 27 Fed. Supp. 258	24-29
Flegenheimer v. United States, 110 Fed. (2d) 379	29
Glasgow v. Moyer, 225 U.S. 420	25
Henry v. Harris, 191 Fed. 868	24
Hick v. Bekins Moving & Storage Co., 115 Fed. (2d) 406	16
Keown v. Hughes, 265 Fed. 572	24
Lipscomb v. United States, 33 Fed. (2d) 33	22
Morris v. United States, 26 Fed. (2d) 444	39
Nations v. United States, 14 Fed. (2d) 507	39
Olsen v. Muskegon Piston Ring Co., 117 Fed. (2d) 162	14
Patting v. Spring Valley Coal Co., 98 Fed. 811	38
Pueblo, etc., v. Archuleta, 64 Fed. (2d) 807	38
Shaw v. Birk, 67 Fed. (2d) 851	38
Shea v. United States, 251 Fed. 433	26-29
Swan Land & Cattle Co. v. Frank, 148 U.S. 603	14

PAGE

Tennessee Publishing Co. v. Carpenter, 100 Fed. (2d) 728 30
United States v. Buck, 18 Fed. Supp. 827 29
United States v. Gilbert, 29 Fed. Supp. 507 29
United States v. Parker, 23 Fed. Supp. 880 29
Wilkes v. United States, 80 Fed. (2d) 285 30

STATUTES

Federal Rules of Civil Procedure [48 Stat. 1064, 28 U.S.C.A. 723, (b) (c)], Rule 41 (b) 2

JUDICIAL CODE

Judicial Code, Sec. 21 [36 Stat. 1090, 28 U.S.C.A. 25] 2

No. 1106

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1941

OTTO REFIOR,

Petitioner,

vs.

LANSING DROP FORGE COMPANY, a Michigan corporation, EMIL M. REFIOR, EDWARD H. REFIOR and ALVA M. CUMMINS,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether any Federal question is involved.

2. Whether the Trial Judge abused his discretion in refusing to grant petitioner more than one week's adjournment on the date set for trial.

3. Whether the affidavit of bias and prejudice filed by petitioner against the Trial Judge was legally sufficient under Section 21 of the Judicial Code.

STATUTES INVOLVED

The Federal Rules of Civil Procedure [48 Stat. 1064, 28 U.S.C.A. 723, (b) (c)], Rule 41(b), provide:

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of court a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule other than a dismissal for lack of jurisdiction or for improper venue operates as an adjudication upon the merits."

Section 21 of the Judicial Code [36 Stat. 1090, 28 U.S.C.A. 25] provides:

> "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of this title, or chosen in the manner prescribed in section 27 of this title, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be

entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

STATEMENT

The original bill of complaint was filed in the District Court on September 9, 1935, and the answer of the original defendants was filed on October 11, 1935 (280). General counsel for petitioner at the time of the filing of the original bill of complaint and up to the present time is Alexander H. Schullman, and original local counsel for petitioner was E. J. Davis (15). On January 21, 1936, petitioner made a motion for an order of the District Court to permit petitioner to examine the books, records and affairs of respondent Corporation. This order was granted and signed on January 27, 1936. On February 12, 1936, petitioner asked for the appointment of a Master in Chancery for the purpose of taking testimony, hearing, determination and report, which was denied on February 17, 1936 (33-35).

The cause was brought on for hearing in open court before the Hon. Edward J. Moinet, District Judge, on June 9, 1936, at which time the present general counsel for petitioner was admitted to practice before the District Court, made the opening statement, placed petitioner on the witness stand and conducted the direct examination. Petitioner had subpoenaed in all of the books and records of

respondent Corporation which, if complied with, would have compelled the entire records of the Corporation to be brought before the Court. During the course of the proceedings, counsel for respondents informed the Court that an audit had been ordered on January 27, 1936, at the request of petitioner, but no audit had been conducted, and inasmuch as a large part of the proofs consisted of figures with respect to the affairs of the Corporation much of the time of the Court would be consumed in auditing the books from the witness stand. Judge Moinet then adjourned the case with the consent of petitioner's counsel and over the objection of counsel for respondents to permit petitioner to conduct an audit, and the Trial Court directed the petitioner to make the audit at once and work diligently.

On July 21, 1936, petitioner filed a petition to restrain respondents from holding a meeting of stockholders and directors, and such a restraining order was issued over respondents' objections on July 27, 1936 (280).

On December 18, 1936, new local counsel appeared in the case and filed a petition for an injunction on behalf of petitioner restraining the directors from taking action on behalf of the Corporation, and on December 29th certain action was permitted and other action was restrained by the Court (281).

On June 21, 1937, new local attorneys were substituted as attorneys for the petitioner in place of the attorneys who had appeared in December, 1936. The new local counsel appeared under authority of a contract with the petitioner dated April 1, 1937 (95-96).

On February 7, 1938, an amended and supplemental bill of complaint was filed on behalf of petitioner naming one of the counsel for respondents as a defendant in the proceedings (36-48). Respondents then engaged additional counsel for all of the then defendants and, on April 15, 1938, respondents filed a full and complete answer to the amended and supplemental bill of complaint containing complete audited statements to substantiate the answer (48-78).

On April 29, 1938, the time for petitioner to file answer to the counterclaims of the respondents was extended by stipulation and kept extended at the request of petitioner until May 12, 1938 (282). The answer of petitioner to the affirmative matter contained in the answer of respondents to the amended and supplemental bill of complaint was not filed until June 12, 1941 (131-136).

Application was made by counsel for respondents to Judge Moinet for specific trial date in June, 1938 (114). Because of congestion in the court docket no trial date was set, and in January of 1939 the cause was placed on the trial calendar to be called before the Presiding Judge on February 14, 1939, for the purpose of setting a definite trial date (114). Respondents requested immediate trial, but the case was referred back to Judge Moinet to set trial date.

In December, 1939, Frank W. Atkinson, of Atkinson & Donnelly, entered the case as new local counsel for the petitioner, and filed a petition for restraining order against any action by the directors of respondent Corporation. During the course of that proceeding, counsel for respond-

ents again requested a definite trial date and Judge Moinet suggested that proofs be taken before a Special Master. Counsel for petitioner agreed that this could be done, and an order of reference was prepared by counsel for respondents. Counsel for petitioner then refused to approve the order and Judge Moinet finally set October 1, 1940, as the trial date (115). Local counsel for the petitioner could not try the case at that time and, on October 30, 1940, notification was received by all counsel from the Hon. Frank A. Picard, District Judge, that the case would be called on November 8, 1940, to set a definite trial date. At the hearing before Judge Picard, this date was set for January 7, 1941.

On December 31, 1940, local counsel for petitioner advised Judge Picard and counsel for respondents that he could not take up the case on January 7, 1941, but could take the case up after January 21, 1941 (116). Inasmuch as counsel for petitioner could not proceed to trial before Judge Picard on January 7, 1941, the Judge suggested that if the proofs could be taken before the Master he would not require counsel for petitioner to proceed on January 7th. Thereupon counsel for petitioner requested that the case be referred to the Master, and Judge Picard stated to all counsel that he would be away from Detroit during February, 1941. Judge Picard instructed counsel for petitioner to prepare an order of reference to the Master, but no such order was prepared between December 31, 1940, and January 8, 1941. Counsel for respondents reported this fact to Judge Picard, and he ordered counsel for respondents to prepare the order of reference and submit it for his signature, which was done. This order (78-80) was a general order of reference. A copy of the order was immedi-

ately given to counsel for the petitioner and Judge Picard was in Detroit between the date of the entry of the order of January 8th and the early part of February, 1941. Also, on January 8, 1941, the Special Master advised all counsel in writing that the case was definitely set for hearing before him on February 17, 1941 (117).

On February 13, 1941, and after Judge Picard had left the City, petitioner filed a motion to revoke the order of reference and set the cause down for hearing in open court (80-82). This petition was noticed for hearing before Judge Picard on March 3, 1941 (82). Respondents' counsel appeared before the Master on February 17th, the date set for hearing, and announced that the respondents were ready for trial. Petitioner and his counsel did not appear and the Master refused to proceed during the absence of Judge Picard. Respondents thereupon filed a petition for a decree dismissing the bill of complaint and dissolving the restraining orders and allowing costs (83-89). This petition was also noticed for hearing before Judge Picard on March 3rd (83).

The Special Master sent out notices of hearing to all of the counsel in the case, including the local counsel for petitioner under the contract on pages 95 and 96 of the Record. When the local counsel received the notice of hearing they filed a petition asking for an order fixing fees and restraining other counsel from proceeding on behalf of the petitioner until such time as they had been paid and properly substituted (90-96). This petition was also noticed for hearing on March 3, 1941.

All three motions set for hearing on March 3, 1941, came on for hearing before Judge Picard on April 28, 1941. At

that time Judge Picard entered an order denying the motion of the petitioner to revoke the order of reference and denying the motion of the petitioner to set the cause for hearing in open court (97). On the following day Judge Picard entered an order restraining Atkinson, Donnelly & Lyon from appearing in the proceedings on behalf of the petitioner until such time as Griffin, Heal & Emery had been paid for their services and had signed a proper substitution (97).

After hearings on the motions had been had before Judge Picard on April 28, 1941, local counsel for the petitioner communicated with Judge Picard and requested that the motions all be held in abeyance until the general counsel for the petitioner, who was in Los Angeles, California, could appear personally before Judge Picard, and general counsel, Alexander H. Schullman, wired Judge Picard from California (248-249) requesting a later trial date. Judge Picard immediately replied (249) setting the motions for hearing on May 12, 1941.

On May 12, 1941, all parties were represented by both general and local counsel for hearing on the motions as set by Judge Picard (146-165). Notwithstanding the fact that Judge Picard had previously denied the motion of petitioner to revoke the order of reference (97), he again heard the motion and also heard the motion of respondents to dismiss the cause. At the same hearing Judge Picard ordered the petitioner to put up a bond to protect the fees which were due and owing to Griffin, Heal & Emery (163). On the motion to revoke the order of reference, the Trial Court stated that he would examine the cases and determine the matter by 5:00 o'clock in the afternoon (165) so

that in the event the order of reference was to remain effective the matter could proceed before the Master on the following day. The Trial Court advised the attorneys present in open court to get ready to at least put in the audit before the Master (165). During the afternoon of that day, the Trial Judge directed the counsel for respondents to prepare a limited order of reference limiting the testimony and evidence before the Master to the audits of the records and books of respondent Corporation (106-107). On the same date, May 12, 1941, petitioner filed a new motion for a stay of all proceedings pending appeal from the limited order of reference entered by Judge Picard earlier on the same date (110-112).

In accordance with the limited order of reference of Judge Picard, the cause came on for hearing on the audits before the Special Master on May 13, 1941 (257-273). At that time petitioner's general counsel, Mr. Schullman, and his local counsel, Mr. Atkinson, appeared before the Master on behalf of petitioner and requested an adjournment of the hearing before the Master for two weeks to perfect an appeal to the United States Supreme Court. After a full statement of the facts (258-273), the Special Master decided that the entire question should be resubmitted to Judge Picard. An adjournment was taken until 2:00 o'clock of that date, when the parties appeared through their various counsel, including both general and local counsel for the petitioner, before Judge Picard (273-277). Judge Picard refused to adjourn the hearing and directed all parties to go back before the Special Master and submit proofs with reference to the audits in accordance with the previous limited order of reference. The hearing was again called before the Master directly after the proceed-

ings before the Judge (277). Messrs. Schullman and Atkinson, general counsel and local counsel for petitioner, came in, served counsel for respondents with a copy of the motion for stay of proceedings and immediately left. After waiting a suitable time, respondents then put in the testimony covered by the audits of the respondent Corporation in accordance with the previous directions of Judge Picard, and this proceeding took two days (277-279).

After the hearing had before the Special Master, the general and local counsel for the petitioner went back to Judge Picard and pleaded with him to have the case set for trial in open court. Judge Picard acceded to this request and suggested to counsel for the petitioner that they consult with counsel for respondents as to a proper order in connection therewith (238). Accordingly counsel for petitioner and counsel for respondent approved in writing a formal order on May 22, 1941, which was entered by Judge Picard on the same date (120-121), in which it was recited that counsel for the respective parties had stated in open court that they were ready for trial. Thereupon the cause was set peremptorily for trial on June 17, 1941, before the Trial Judge. It was further provided in the order that if either party did not appear for trial on that date a default might be entered and the case tried as a default case. It was also provided that the testimony submitted by the respondents to the Special Master could be read into the record at the trial before the Judge, and that the respondents would produce the witnesses for cross-examination (121). Petitioner was not to be prejudiced in any way by his failure to participate in the hearings before the Master on May 13 and 14, 1941. The Judge had previously entered an order denying the respondents' motion to

dismiss the bill of complaint because of the failure of the petitioner to appear before the Master in accordance with the order of the Court (105).

Between May 22, 1941, and the date set for trial by the Judge and on June 10, 1941, Griffin, Heal & Emery filed a petition for an order framing issues and determining the conditions upon which substitution could be had, which was a matter solely between the petitioner and Griffin, Heal & Emery (125-131).

On June 16th the petitioner filed a bond to protect the claim of Griffin, Heal & Emery (137-138). On June 17th, which was the date set for trial, and when all parties were present by both their general and local counsel, the hearing was opened by a request by Mr. Griffin for certain changes in the bond which had been filed by the petitioner to protect the claim of Griffin, Heal & Emery (166-201). Questions arising between Griffin, Heal & Emery and the petitioner were of no concern of the respondents. During the progress of this hearing the Trial Judge and general counsel for the petitioner, Mr. Schullman, differed regarding the practice of Mr. Schullman in connection with the bond filed by the petitioner for the protection of Griffin, Heal & Emery. The Judge finally directed Mr. Schullman to make certain changes in the bond and then stated that he would proceed with the trial of the case (178).

At that point one of the local counsel for the petitioner asked the Court for a short recess to discuss the question of local counsel proceeding further in the case (178). When Court reconvened after the recess, Messrs. Atkinson and Donnelly, as local counsel, withdrew from the case (179).

Thereupon Mr. Schullman requested "a couple months' " adjournment for the purpose of securing new local counsel (181). Respondents objected to this adjournment, and after considerable discussion of the entire question (181-191) the Court announced that the case would proceed at 2:00 o'clock in the afternoon. When Court reconvened pursuant to the adjournment, local counsel and general counsel for the petitioner requested an adjournment from the Court (191-201). After listening to all of the arguments, the Trial Judge agreed to give the petitioner a one week's adjournment upon the payment of $100.00 costs (199-200). Plaintiff refused to accept one week's adjournment upon payment of costs and refused to go on with the case (200). The petitioner did not ask for voluntary dismissal of the bill of complaint. The Trial Judge thereupon ordered the decree dismissing the bill of complaint with prejudice (200). The decree was entered on the following day, June 18, 1941 (138-139).

Nine days after the entry of the final decree, and on June 27, 1941, petitioner, through his general counsel, filed a motion to set aside and vacate the final decree of Judge Picard dismissing the bill of complaint and to continue the date of trial to permit petitioner to secure local counsel and to proceed on an affidavit of bias and prejudice (140-144). On July 7, 1941, respondents filed an answer to this motion denying all of the material allegations (213-217). About two weeks after the final decree had been entered and on July 3, 1941, petitioner filed an affidavit of bias and prejudice against Judge Picard (201-213). On July 7th respondents filed a motion to strike the petitioner's affidavit of bias and prejudice from the files as legally insufficient (218-222). The motion of the petitioner to set aside

and vacate the decree and the motion of the respondents to strike the affidavit of bias and prejudice from the files and the question of taxation of costs came on for hearing before Judge Picard on July 7, 1941. Petitioner appeared by his general counsel, Mr. Schullman, and respondents appeared by local counsel (223-234). Judge Picard directed that an order be entered denying the motion of petitioner to set aside and vacate the decree and granting the motion of respondents to strike the affidavit of bias and prejudice from the files and tax respondents' costs (222-223). On July 16, 1941, petitioner filed notice of appeal to the Circuit Court of Appeals (251). Approximately one month later and on August 18, 1941, petitioner's general counsel filed a self-serving affidavit which is not properly a part of this proceeding (235-250).

On September 23, 1941, petitioner filed a motion in the Circuit Court of Appeals to restrain respondents from holding a meeting of stockholders and directors (288-295). Such a restraining order was entered by the Circuit Court of Appeals on September 23, 1941 (295-296). The appeal was argued and submitted on December 3, 1941, and a decree was entered by the Circuit Court of Appeals on January 5, 1942, affirming the decree of the District Court after written opinion by the Circuit Court of Appeals (297-307). The opinion is reported in 124 Fed. (2d) 440.

On February 10, 1942, petitioner asked for an extension of the restraining order and filed a petition for rehearing. The petition for rehearing was denied on February 13, 1942 (383), and the Circuit Court of Appeals stayed the mandate and denied the motion for continuance of the restraining order on March 6, 1942 (396).

Information Handling Services

ARGUMENT

I.

Respondents contend that no Federal question is involved.

Petitioner contends that he is entitled to a writ of certiorari because the Circuit Court of Appeals for the Sixth Circuit has decided a Federal question in a way which he contends is in conflict with the applicable decisions of this Court, and states further that the Court of Appeals had declined to apply the rule of this Court as set forth in *Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, and on the contrary had applied its own rule as set forth in *Olsen v. Muskegon Piston Ring Co.*, 117 Fed. (2d) 162.

Respondents contend that there is no conflict whatever between the rulings of the two cases cited by petitioner. In the *Swan Land & Cattle Co.* case this Court stated very clearly that the question presented for its consideration and determination was whether a trial court can entertain jurisdiction of a suit in equity which unites and seeks to enforce both legal and equitable demands, when the right to the equitable relief sought depends upon the legal claim being first ascertained and established, and where the person against whom the legal demand is ascertained is not made a party defendant to the proceedings. It appears from the opinion in the case that certain individual defendants in Illinois were made parties and served with process. They demurred to the bill on several grounds, one of which was that certain corporations were necessary parties to the suit. The lower court sustained the demurrer and dismissed the bill with prejudice, and the question was before this Court as to whether or not the demurrer was

properly sustained. This Court held that the bill was properly dismissed but that the dismissal should have been without prejudice for two reasons, one that the complainant should have reduced its claim to damages in a law action before coming into equity for the enforcement of the claim, and that indispensable parties defendant had not been joined in the proceedings.

In the case of *Olsen v. Muskegon Piston Ring Co.*, supra, the Circuit Court of Appeals for the sixth Circuit was considering the question as to whether or not a dismissal order in a former case constituted a bar to the prosecution of the second proceeding. The prior case had been dismissed with prejudice because of failure of counsel for plaintiff to proceed to trial when directed by the Trial Court. The Appeals Court held that opportunity to be heard gave the plaintiff his day in court and the dismissal was justified. It also held that a judgment on the merits does not require a trial when the parties are all before the Court and subject to the orders of the Court as to procedure. The facts of the *Muskegon Piston Ring Co.* case and the *Swan Land & Cattle Co.* case were entirely different, and there is no conflict between the two cases. Since the *Swan Land & Cattle Co.* case the Federal Rules of Civil Procedure in Rule 41(b), cited above, have definitely given the Trial Court the right to dismiss an action for failure of the plaintiff to prosecute or comply with the rules or any order of the Court, and in the event of such dismissal it operates as an adjudication upon the merits under the terms of the rule. There is clear authority for the action taken in the instant case by the Trial Judge.

II.

Respondents contend that the Trial Judge did not abuse his discretion in refusing to grant the petitioner more than one week's adjournment on the date set for trial of this cause.

There can be no question about the discretion of the Trial Judge to dismiss a cause under the circumstances. *Hicks v. Bekins Moving & Storage Co.*, 115 Fed. (2d) 406-408.

Petitioner contends that the Trial Judge abused his discretion in not permitting petitioner to have an extended adjournment for the purpose of securing new local counsel after the withdrawal of the local counsel that petitioner then had on the date set for trial. Respondents contend that not only did the Trial Judge use proper discretion in denying the motion for continuance, but that the Trial Judge exercised extraordinary caution in seeing that the interests of the petitioner were protected. The statement of this case appearing above will show conclusively that the petitioner not only had one opportunity to present his evidence to the Court to substantiate the allegations of his bill of complaint, but that he had innumerable chances to do so, all of which he avoided by what general counsel for petitioner apparently considered adroit and clever shifting of position in a deliberate attempt to embarrass the respondents and the Trial Judge.

At the expense of possible repetition, counsel for respondents desire to point out the opportunities given to the petitioner to present his case to the Court. Ordinarily a plaintiff who files a bill of complaint is supposed to be ready to present his case at any time after the cause is at issue, and in such a way as to constitute orderly procedure under the rules of Court. Petitioner filed his bill of com-

plaint in September, 1935. In January, 1936, he was given the right to make an audit of the affairs of the respondent Corporation for the purpose of presenting evidence to the Court to substantiate his allegations. He failed to do this and came into Court in June of 1936 wholly unprepared to present his proofs in an orderly way. The Trial Judge adjourned the case and instructed the petitioner to procure an audit and work diligently. From June of 1936 to February of 1938 the only activities of the petitioner consisted of securing two new firms of attorneys and securing restraining orders preventing any directors' and stockholders' meetings of the respondent Corporation. As a result of the insistence by the then counsel for the respondents that the case be tried, the amended and supplemental bill was filed in February of 1938, and after respondents' answer was filed in April, 1938, the case was then again ready for trial. From April, 1938, to October, 1940, petitioner continued to rest upon restraining orders secured by his counsel to prevent any action by the respondent Corporation, and in October, 1940, when Judge Moinet set the case for trial definitely, local counsel for petitioner secured an adjournment because he could not try the case at that time. When the case was again set for trial on January 7, 1941, counsel for petitioner began a series of maneuvers to avoid the trial of the case which are without parallel in the knowledge of counsel for respondents. In order to avoid going to trial before Judge Picard on January 7, 1941, so that the trial of the case could be concluded before Judge Picard left the City on his vacation, petitioner's local counsel requested the Judge to refer the cause to the Master to take proofs. After the case had been set for trial by the Master on January 8, 1941, petitioner did not object to the order of reference until February 13th, when he filed a

motion to revoke the order of reference appearing on pages 108 to 110 of the Record. Local counsel had been advised that Judge Picard would be out of the City during February, so it is conclusive that the motion to revoke the order of reference was deliberately held up until Judge Picard had departed, and local counsel therefore knew that any motion filed in February in this case could not be heard until Judge Picard would return in March of 1941. In the opinion of respondents' counsel, this constituted sharp practice which should merit severe criticism by the Court.

When Judge Picard returned from his vacation in March of 1941 and discovered that counsel for petitioner had not only been guilty of sharp practice with respect to the motion filed during his absence, but that he had secured new local counsel without securing a substitution from his other local counsel with whom the petitioner had a specific written contract, set forth on pages 95 and 96 of the Record, Judge Picard was, as we believe, rightfully indignant and very properly ordered petitioner to make arrangements to pay his discharged local counsel as a preliminary to further proceedings in the case. Although Judge Picard advised the general counsel for the plaintiff on April 29, 1941, that petitioner's former counsel would have to be paid (249), petitioner's general counsel sought by every means possible to avoid this proper order of the Court and did not file the bond to secure the former counsel until June 16, 1941, which was just one day prior to the time that the case was scheduled to be tried in open court, and which was approximately one month after counsel for petitioner had been notified that he would have to submit his case to the Special Master. On this phase of the case, petitioner received every consideration from the Trial Judge consistent with proper protection of petitioner's former counsel.

Notwithstanding the fact that petitioner had requested the reference to the Master in order to avoid going to trial in January, 1941, petitioner then sought to avoid presenting his evidence before the Master by filing motions to vacate the order of reference, claiming that the issues in the case should not be submitted to the Master (80-82 and 108-109). At the time of the argument before the Court with respect to the motion to vacate the order of reference petitioner's general counsel argued (146) that the order of reference was made without the approval of petitioner or his general counsel. Petitioner's general counsel would not accept the fact that petitioner's local counsel, Frank W. Atkinson, who petitioner's general counsel had advised the Court was his authorized local counsel (248-249), had requested the reference. The Trial Judge very properly put general counsel for the petitioner straight on this important point and then the general counsel for petitioner insisted that all matters of fraud be heard by the Court, whereupon the Trial Judge ruled that the reference should be limited to testimony as to the audits of the books and records of the respondent Corporation. Accordingly a limited order of reference was entered by the Trial Judge (106-107). Immediately upon the entry of this order petitioner moved for a stay of all proceedings pending an appeal from the limited order of reference. However, notwithstanding the fact that both the general and local counsel for petitioner appeared before the Master to make a statement (257-273), petitioner's counsel did not participate in any proceedings before the Master and did not accept the opportunity then presented to offer testimony by means of audits which would substantiate the allegations of the original and amended bills of complaint. The proceedings before the Master continued for two days, on May 13 and

14, 1941. Respondents at that time introduced full and complete testimony with regard to all of the facts and figures set up in the respondents' answer to the amended and supplemental bill of complaint.

Counsel for respondents believe that up to this point petitioner had had ample opportunity to present his case to the Court, but notwithstanding all the chances presented, counsel for petitioner again went to Judge Picard and asked him to reconsider the question of having the entire case tried before the Trial Judge. Although counsel for respondents considered that there was no basis whatever for any further consideration to the petitioner, the Trial Judge stated that he wanted the petitioner to have the chance to present his case in open court, and thereupon the general counsel for petitioner, the local counsel for petitioner and the attorneys for the respondents entered into a stipulation by means of an order of the Court approved by counsel for both parties in writing (120-121), whereby it was recited that both parties were ready for trial and the cause would be set peremptorily for trial on June 17th, and if either party was not ready at that time the cause would be tried as a default case. It was further provided that the petitioner was not to be prejudiced in any way by the fact that testimony had been taken by the Master on May 13th and 14th. This is positive and conclusive proof that on May 22, 1941, the petitioner and his general and local counsel all understood that this case would go on for trial on June 17th, and that there would be no further adjournments of any kind. Any attorney who had been through all of these preliminary proceedings should know definitely after such an order by the Court that there would be no adjournments beyond June 17th. Notwithstanding this, general counsel

for petitioner came into Court on the morning of June 17, 1941, and counsel for respondents believe and charge that he deliberately created a situation which he thought would result in a further adjournment of this case by having local counsel for the petitioner withdraw and then requesting an adjournment to secure other local counsel. Counsel for respondents charge, further, that the Trial Judge was extremely mild in dealing with this palpable instance of sharp practice. Notwithstanding everything that had gone before, which was certainly more than enough to test the patience of any Trial Judge and bring it to the breaking point, Judge Picard retained his composure and against serious objection by counsel for respondents offered the petitioner a further week's adjournment upon payment of costs of $100.00 (200). In other words, Judge Picard, notwithstanding all the opportunities which had been given the petitioner to put in his case, all of which had been successively refused or avoided by petitioner, gave him one last final chance to present his case to the Court. He again refused and thereupon the Trial Judge entered a decree dismissing the original and amended and supplemental bills of complaint. If any abuse of discretion was involved in the Trial Judge's many orders in favor of the petitioner, it consisted of the requirement that the respondents be ready for trial on many occasions at a considerable expense with out-of-town witnesses, and for Master's fees and other expenses which are incidental to trials of this nature with an allowance of only $100.00 to cover all this expense. The allowance of $100.00 did not cover the expense incurred and paid by respondents in presenting the case before the Master, not to mention all of the many days spent by counsel for respondents and the time of respondents and their

auditors in appearing in Court in vain attempts to get the petitioner to put in his case.

Petitioner is in the anomalous position of contending that his local counsel had no authority to consent to the reference to the Special Master, and that any requests of that nature must be approved by general counsel, and he then argues that the Court abused its discretion in not granting him a further adjournment to procure other local counsel to try the case. If his general counsel were so completely in charge of the proceedings as to have to pass on all orders of reference, etc., he should certainly be in a position to try the case when it was reached for trial notwithstanding the withdrawal of local counsel.

Counsel for respondents have good authority for denominating the tactics of counsel for petitioner as sharp practice. In the case of *Lipscomb v. United States,* C.C.A. 8, 33 Fed. (2d) 33-34, the Court said:

> "For about two months after arraignment accused made no move to disqualify the Judge although he had full knowledge during all of that time of every fact which he relied upon for disqualification. He waited until a few days before the time set for trial. The natural consequence of such action would be to secure a continuance. Such sharp practice will not avail and has in similar instances been condemned by this Court. *Bishop v. U. S.,* 16 Fed. (2d) 410; *Rossi v. U. S.,* 16 Fed. (2d) 712, 716."

Respondents therefore contend that unquestionably the answer to question 2 is that the Trial Judge did not abuse his discretion in refusing to grant the plaintiff more than one week's adjournment on June 17, 1941, when this case

was supposed to have been ready for trial peremptorily in accordance with the previous order of the Court under date of May 22, 1941 (120-121). Petitioner contends that the order of the Trial Court that the case be tried as a default case in the event either party was not ready for trial would require that the case be dismissed without prejudice. This is not true, for when a default case is tried the party not in default has a right to have a decree in his favor with prejudice, and the provisions of the Court Rule 41(b), as set forth above, show conclusively that the Trial Judge was correct in dismissing the case with prejudice.

III.

The affidavit of bias and prejudice filed by petitioner against the Trial Judge was legally insufficient under Section 21 of the Judicial Code for the following reasons:

A. Section 21 of the Judicial Code provides that an affidavit of personal bias or prejudice on the part of the Trial Judge can only be filed when such affidavit states facts and reasons for a belief that a judge has a personal bias or prejudice against the party filing such affidavit or in favor of any opposite party to the suit.

B. An affidavit of bias and prejudice must be filed not less than ten days before the beginning of the term of court or good cause must be shown for the failure to file it within such time.

A.

The quoted section of the Judicial Code provides that an affidavit of bias and prejudice shall state the facts and the

reasons for the belief that a bias or prejudice exists against a party. Examination of the affidavit of bias and prejudice filed in this case shows clearly that the entire affidavit is based upon remarks made by the Trial Judge about the general counsel for petitioner, Mr. Alexander Schullman. At no place in the affidavit are any facts set forth which would show or tend to show that the Trial Judge had any bias or prejudice against the petitioner or his case.

The affidavit must be strictly construed and strictly conform to the statute. *Henry v. Harris,* 191 Fed. 868, *Keown v. Hughes,* 265 Fed. 572, *Fieldcrest Dairies v. City of Chicago,* 27 Fed. Supp. 258.

Respondents therefore contend that all of the allegations contained in the petitioner's affidavit of bias and prejudice which refer to comments by the Trial Judge about Alexander H. Schullman are not properly a part of such an affidavit. The only portion of the affidavit referring to the petitioner himself appears on page 203 of the Record where the Trial Judge said:

> "Well, Mr. Refior has borne with you through seven or eight firms of attorneys and I don't know as he wants to change his tactics now."

This lone statement does not set forth a fact which is sufficient to cause the Trial Judge to disqualify himself as being biased and prejudiced against the petitioner in the manner contemplated by the Act.

B.

In one of the first cases to arise after the enactment of the provision of the Code permitting affidavits of bias and prejudice, the Trial Judge in *Ex Parte Glasgow*, 195 Fed. 780, held that the Legislature intended the affidavit to be filed before the trial of the case unless good reason to the contrary be shown. The Lower Court held further that it would require specific language in the Act to permit such an affidavit to be filed after a case had been tried. The case was appealed to the United States Supreme Court as *Glasgow v. Moyer*, 225 U. S. 420. The Supreme Court affirmed the District Court and quoted from the District Court opinion with reference to the petition and discharged a writ of habeas corpus, thereby approving the ruling of the Trial Court holding the affidavit legally insufficient under the Code.

In *Ex Parte American Steel Barrel Co.*, 230 U. S. 35, the Supreme Court of the United States stated that the provision was obviously not applicable except in rare instances in which the affiant was able to state facts which tended to show not merely adverse rulings but facts and reasons which tended to show personal bias and prejudice. The Court also stated that it was not intended to paralyze the action of a judge who has heard a case or any question in the case, and that this was indicated by the plain provision of the Act that the affidavit be filed not less than ten days before the beginning of the term.

The Sixth Circuit Court of Appeals ruled upon the requirements of the Code in connection with such an affidavit

in *Shea v. United States,* 251 Fed. 433. In that case the term of the District Court began on October 31st. The case was assigned for trial on December 4, 1916. On that date the plaintiff in error asked that the case be adjourned for a few weeks and the case was set down for trial on Monday, January 8, 1917. On Saturday, January 6, 1917, when jurors had been summoned and witnesses for the Government at distant places had been subpoenaed, an affidavit of bias and prejudice was tendered for filing but refused by the Trial Judge. The Court held that the Trial Judge rightly refused to consider the application and that technically the application came too late. The Court said:

> "We rest our affirmance of the action of the District Judge upon the ground that the affidavit of disqualification was not tendered in due season, and that the circumstances were such as to justify belief that the affidavit was purposely held back and its use on the eve of trial resorted to for the purpose of securing a postponement. The better practice would have been to permit the affidavit to be filed and then strike it from the file, thus preserving a more complete record."

The Court also held in the same case that as an appeal court it had no right to review the action of the Trial Court in refusing to grant a further adjournment unless it clearly involved an abuse of discretion, and the Court held that this case did not present any abuse of discretion. In many of its facts the case cited is comparable to the case now under consideration by this Court. In the case cited, defense counsel asked a postponement on the day set for trial for the reason, among others, that one of the attorneys for the defendant was giving up his defense at that time and new counsel would not have time to prepare. The counsel

who made the application for the adjournment and who actively tried the case had been retained on the evening of the previous day, and yet the Court held that it was not an abuse of discretion to deny an adjournment. We submit the case is ample authority for affirming all of the action taken by the Trial Judge in this case.

Chafin v. United States, 5 Fed. (2d) 592, certiorari denied 269 U. S. 552. An affidavit of bias and prejudice was filed against the District Judge just before trial was to start and the Judge refused to allow the affidavit to be filed and proceeded with the trial. The Circuit Court of Appeals for the Fourth Circuit affirmed the Judge's action. In this case the indictment was not returned until after the term of court at which the defendant was to be tried had commenced. Defendant appeared on September 20, 1924, and was admitted to bail and trial set for October 6th. On the morning of October 6th the case was called for trial and, at the request of defendant's counsel, was postponed until the afternoon. The District Attorney refused to grant a continuance and at the afternoon session the affidavit of bias and prejudice was tendered by defendant's counsel. The Judge refused to receive it or allow it to be filed because it had not been seasonably presented and because the purpose of the presentation was to obtain a continuance. The Circuit Court of Appeals held that the affidavit was not seasonably filed and said:

> "There is no escape from the conclusion that the defendant on September 20, 1924, knew everything alleged to show bias and prejudice of the presiding judge that he knew on October 6 following, and that he delayed presenting his affidavits for sixteen days."

The Court then analyzed the statute and the legislative intent and held as follows:

> "But the statute was not intended to make this right and privilege of removing a judge from the bench unlimited and arbitrary. Its language and spirit require of the defendant, as the price of the privilege bestowed, such diligence in its use as will give the least inconvenience and expense to the opposing party and obstruct as little as possible the due course of the administration of justice. A statute can rarely provide in express terms for all possible contingencies. The Legislatures and the people must depend on the courts to give statutes such interpretation as will express their spirit and tenor, applying them when the case is clearly within the right to be protected or the mischief to be remedied.
>
> • • •
>
> "Here the defendant, in deliberately and unfairly withholding his challenge of the judge until the day of trial, violated both the letter and spirit of the statute and can take no benefit under it. *Shea v. United States* (Sixth Circuit) 251 F. 433, 163 C. C. A. 451."

Cuddy v. Otis, C.C.A. 8th, 33 Fed. (2d) 577:

> "The foregoing pronouncements are decisive of this application. The only facts and reasons assigned for the prejudice alleged to exist are the rulings of respondent upon applications for continuance, made in the exercise of judicial discretion and in administration of court rules in such cases made and provided. If such rules are inapplicable, and the rulings made constitute an abuse of sound discretion, the resulting error may be corrected on ap-

> peal. We find in the record before us no support for the affidavit of disqualification, and we cannot indulge the practice of making a mere denial of continuance sufficient foundation for resort to this provision of the Judicial Code."

It was held in *United States v. Parker*, 23 Fed. Supp. 880, that the ten-day provision of the Act is a matter of substance rather than form.

The Trial Judge against whom the affidavit is filed has the right and the duty to pass on the legal sufficiency of the affidavit. *Berger v. United States*, 255 U. S. 32; *United States v. Gilbert*, 29 Fed. Supp. 507; *Fieldcrest Dairies v. City of Chicago*, 27 Fed. Supp. 258; *United States v. Buck*, 18 Fed. Supp. 827.

The proper procedure in the event the Trial Judge finds the affidavit is legally insufficient is to strike it from the files. *Shea v. United States*, 251 Fed. 433; *Flegenheimer v. United States*, 110 Fed. (2d) 379.

Bishop v. United States, 16 Fed. (2d) 410-411:

> "A new means of securing continuances would result from holding that such affidavits of prejudice where the facts are known long before may be held until the last moment before trial and then filed.
>
> • • •
>
> "A defendant should not be compelled to try his case before a judge who has expressed prejudice against him. On the other hand, every consideration of fair dealing with the court requires that parties

> complaining of the prejudice must not make the statute a mere instrumentality for delay. That was not the purpose of its enactment."

Wilkes v. United States, C.C.A. 9th, 80 Fed. (2d) 285-289:

> "The affidavit further states that counsel for the defendants requested Judge Cosgrave to postpone the trial of this case from May 16 to June 6, 1933, and that he declined to postpone it to June 6, but did postpone it to May 23, 1933. These rulings cannot be made the basis of a charge of personal bias or prejudice. *Berger v. United States*, supra; *Ex parte American Steel Barrel Co.*, supra; *Minnesota & Ontario Paper Co. v. Molyneaux* (C. C. A.) 70 F. (2d) 545, 547; *Craven v. United States* (C. C. A.) 22 F. (2d) 605, 608. The affidavit sets out at length the colloquies which, on information and belief, are said to have occurred between court and counsel on the two occasions when this request was presented and considered. We find therein nothing from which a fair inference of bias or prejudice may be drawn."

Also see *Tennessee Publishing Co. v. Carpenter*, C.C.A. 6th, 100 Fed. (2d) 728-734.

The quoted section of the Code provides that if an affidavit of bias and prejudice is not filed ten days before the beginning of the term of court, good cause must be shown for the failure to file it within such time, and the authorities are clear that any party filing such an affidavit must do so immediately upon discovery of the facts upon which such an affidavit is based. In this case the Record is clear that on May 12, 1941, when the parties were before the Trial

Judge on the question of reference to the Master, the Judge definitely expressed himself as critical of the attitude of the general counsel for the petitioner. Inasmuch as the affidavit of bias and prejudice is based upon the critical attitude of the Trial Judge toward the general counsel, the petitioner and his general counsel were entirely aware of the things complained of in the affidavit of bias and prejudice on May 12, 1941. For record of that proceeding see Record 146-165. Again on May 13, 1941, all counsel were before the Court (273-277). The Court at this time again expressed himself as being firm about the case proceeding and that he would not longer entertain any motions for continuance upon any ground. The Court at that time told the local counsel for the petitioner that he was disgusted with the tactics of the petitioner and that he would not let the petitioner and his counsel play "horse" with the Court any longer (276-277). Counsel for respondents therefore claim that the petitioner was fully apprised of the attitude of the Judge toward petitioner's general counsel as early as May 12th and 13th, 1941, and when the case was called for trial before Judge Picard on June 17th more than a month had elapsed, during which the petitioner did not file any affidavit of bias and prejudice. Petitioner now contends, through his general counsel in his affidavit of bias and prejudice (201), that while he was aware of the bias and prejudice of the Judge before the trial date on June 17th which must have therefore existed in his mind on May 12th and 13th, he did not file the affidavit of bias and prejudice at that time because his counsel advised him that the prejudice which he considered existed at that time would disappear from the mind of the Judge at the trial of the case (201-202). It is therefore clear that the petitioner under his own statement knew of the alleged bias and pre-

judice for over one month before the case was called for trial, and his failure to file the affidavit during that period is fatal under the Act and the authorities cited.

If this Court should decide that the affidavit states facts and reasons which substantiate a charge of bias and prejudice on the part of the Trial Judge and that good cause was shown for failure to file the affidavit before June 17th, notwithstanding all that, we still contend that the affidavit of bias and prejudice should be stricken from the files because it was not filed until two weeks after the final decree was entered, and certainly the Act does not permit such an affidavit to have any force or effect whatever when filed after a final decree has been entered by the Trial Court. Even assuming that petitioner's allegations are true that he did not fully appreciate the extent of the bias and prejudice of the Trial Judge until June 17th, his general counsel was served on June 17th with a proposed form of final decree and a notice that the decree would be presented before the Trial Judge on June 18th (138-139) at 11:00 A. M. Petitioner therefore had the balance of June 17th and until 11:00 A. M., on June 18th to prepare and present an affidavit of bias and prejudice to the Trial Judge before the final decree was entered, but neither petitioner nor his general or local counsel appeared before the Court or made any objection to the entry of the decree, and did not present any affidavit within that time. Respondents contend that under the Act and the authorities cited all of the delays in filing such affidavit were fatal and made the affidavit legally insufficient under the Act. The Trial Judge held the affidavit legally insufficient and entered an order to strike it from the files, which was proper under the authorities cited above.

IV.

DISCUSSION OF PETITIONER'S BRIEF

Throughout the entire proceedings general counsel for petitioner, Mr. Schullman, has considered that if the petitioner, Otto Refior, or Mr. Schullman did not specifically approve the actions of local counsel for the petitioner, the petitioner and his general counsel were not bound. Local counsel would appear before the Court on behalf of the petitioner and after argument of motions the Court would make a ruling which the Court and the respondents' counsel would consider was binding on all parties. Petitioner's general counsel would then come in and reargue the entire question as though the petitioner had never before been represented before the Court. Naturally the Trial Judge took issue with Mr. Schullman on this point. Notwithstanding this, Mr. Schullman refused to accept the rulings which had been made and carried his arguments to the point where any Judge would have lost patience with Mr. Schullman. Also, Mr. Schullman knew on April 29, 1941, that the case would proceed before the Master on May 13th unless the order of reference was revoked on May 12th (249). Mr. Schullman was also advised by the Judge that it would be necessary that his discharged local counsel be paid or a bond deposited to insure payment of discharged local counsel before any other local counsel could proceed. Any reasonable attorney would have been prepared to go ahead before the Master as the Judge directed, or would have been prepared to accept a decree against his client. Mr. Schullman did not only not prepare to proceed before the Master but he refused to comply with the order of the

Judge to file a bond to protect the discharged local counsel. Counsel for respondents contend that the Trial Judge was extremely lenient under the circumstances with Mr. Schullman, and that a great majority of trial judges would have considered the matter closed on May 13th when the Judge ordered the limited reference on auditing matters only to proceed before the Master. Judge Picard, however, in an effort to be absolutely certain that petitioner would have no reason whatever to complain, followed this on May 22nd by ordering that the trial proceed before him peremptorily on June 17th, and that the petitioner be not biased whatever by any of the proceedings which took place before the Master (120-121). Again any reasonable trial counsel would have been absolutely certain that after all that had gone before, there could be no adjournments whatever for any reason when the case was called for trial on June 17th, and would have been completely prepared for trial on June 17th, and would have been absolutely certain that discharged local counsel had been protected by an adequate bond long before the trial date. However, Mr. Schullman did not file the bond to protect local counsel until June 16th, and then filed a bond which was not in accordance with the specific orders of the Trial Judge. Counsel for respondents cannot believe that Mr. Schullman and local trial counsel were sincere in the proceedings which took place before the Judge on June 17th. We believe that Mr. Schullman deliberately created a situation which gave his local counsel the excuse to withdraw from the case in an effort to gain a further continuance. As petitioner had kept the respondent Corporation tied up with restraining orders and injunctions so that no stockholders' meetings could be held and no directors' meetings could be held to do anything other

than such affairs as came up in the ordinary course of business, he desired to continue to embarrass the individual respondents and the respondent Corporation to carry out a threat which the petitioner had made to the individual respondents, that if they did not buy his stock in the respondent Corporation at his price he would make them so much trouble that they would be glad to pay him three times the amount which he had asked. Counsel for respondents made these same statements in motion to strike the affidavit and on hearing before the Trial Judge (220). The Trial Judge however did not permit everything which had gone before to influence him in his judgment about the rights of the petitioner, but notwithstanding everything which had transpired he did on June 17th, after local counsel had withdrawn, grant the petitioner a further one week's adjournment upon payment of costs of $100.00 to secure new local counsel to proceed in the case. We cannot believe that any criticism whatsoever could be directed against the Trial Judge for any of the actions which he took in this case.

Petitioner's general counsel contends that petitioner could not proceed to trial of the case without local counsel. The fact remains, however, that in 1935 when this case was on for trial before Judge Moinet, petitioner's general counsel was admitted to the Bar of the Eastern District of Michigan for the purpose of trying this case. He made the opening statement, conducted the examination of the witnesses on the stand and argued all of the questions with the Trial Judge, and his then local counsel did not participate in the proceedings at all. He was therefore fully equipped and should have been prepared to try this case when it came on for trial this time, and local counsel would not have been

required to be familiar with all of the details of the case as Mr. Schulhman, through his intimate contact with the entire case since the original bill of complaint was filed in 1935, was perfectly competent to conduct the trial. We therefore believe that all of the argument made by petitioner in his brief that the petitioner had no opportunity to secure local counsel and properly prepare for the trial of the case is not justified under the facts.

Petitioner contends that the Trial Judge should have assigned this case to another judge after the final decree had been entered. No affidavit of bias and prejudice was filed which would cause the Trial Judge to consider any reassignment until approximately two weeks after the final decree, so we do not consider that this criticism has any justification whatever. The Trial Judge also informed counsel for petitioner that Judge Moinet had stated to the Trial Judge that he did not believe that the petitioner wanted to try his case (193-194). So two competent Trial Judges arrived at the same conclusion. We submit that no other conclusion was possible in view of the facts in this case.

Counsel for petitioner blames the Trial Judge for the withdrawal of his local counsel. As we have previously stated, it is quite apparent from all the circumstances that local counsel withdrew either because of their complete disgust with the stalling tactics of the general counsel for the petitioner, or as a means of securing a continuance. Certainly there was no obligation on the Trial Judge to compel local counsel to proceed in a case with which they were not in sympathy. It is only necessary to read the bill of complaint and the answers filed in this case to fully understand why local counsel were not overly anxious to try this case.

Judging from the fact that Miller, Canfield, Paddock & Stone, Griffin, Heal & Emery and Atkinson & Donnelly all deserted the petitioner's case, you can only reach the conclusion that petitioner's proofs did not substantiate the allegations of his bill of complaint after a thorough examination of the respondents' pleadings.

Counsel for respondents believe and say with confidence that in the event petitioner had been prepared to go ahead with the trial of this case on the 17th of June he could not possibly have gotten a fairer trial judge to try the case than Judge Picard. The Judge very clearly stated to the petitioner that he thought that if he were to try the case after what had happened he would probably lean over backwards and the respondents might suffer. We are inclined to share the Judge's feelings in this regard and believe that if the petitioner had shown the slightest evidence of being ready for trial and proceeding with trial of the case, Judge Picard would have been so happy over the abandonment of the stalling tactics by the petitioner that he would have given the petitioner more than an even break.

Petitioner's brief stresses the fact that no hearing was ever had on this case on the merits. We submit that the Record is clear that the only reason no hearing was had on the merits is that he never took advantage of his many opportunities to have a full and complete hearing not only before the Special Master, where all facts could be produced, but also before the Trial Court.

Counsel for petitioner cite *Brown v. Fletcher,* 182 Fed. 963, as authority for contention that the case should have been dismissed without prejudice. Reference to this case shows that the motion to dismiss the case was made strictly

on the basis of want of prosecution, and the Trial Court in that case did dismiss the case solely upon that ground and the Circuit Court of Appeals said (p. 982):

> "Since the court below definitely stated in its decree a single and sufficient ground for dismissal (want of prosecution), and omitted to state any other ground set out in either the proceedings or discussed in the opinion, there is no foundation for the second plea."

The case therefore presented a far different question than the one we are now considering.

Petitioner also cites *Pueblo, etc., v. Archuleta,* 64 Fed. (2d) 807. The Circuit Court of Appeals for the Tenth Circuit there said:

> "There could be no such adjudication between the parties in this case, for the defendants, not being in court, could not be concluded by such adjudication."

Also, the case of *Patting v. Spring Valley Coal Co.,* 98 Fed. 811, cited by counsel for petitioner, has the same distinguishing features. The Court clearly stated in the opinion as follows:

> "The plaintiff not appearing, and there being no reason for delay or indulgence, the proper course was to dismiss the action for want of prosecution."

Counsel for petitioner also cites the case of *Shaw v. Birk,* 67 Fed. (2d) 851. It appeared in that case that at the time the case came on for trial the defendant made a complete change of front as to the defense to be introduced, and the plaintiff was not prepared to meet this new defense with the evidence which he then had available. The Court said (p. 852):

> "Shaw had the right, if he was not compelled, to rely for recovery upon the foreign judgment up to the very day of the final trial. He was placed at a serious disadvantage by Birk's sudden change of front. The judgment against him should at least have been without prejudice to his original cause of action based on the contract."

The facts of the case were such as to distinguish it from the case we are now considering.

As support for petitioner's contentions with regard to the affidavit of bias and prejudice, petitioner cites *Morris v. United States,* 26 Fed (2d) 444. In that case an affidavit of bias and prejudice was held sufficient, but the failure to file until the day of trial was justified by the fact that on the very day of trial the party making the affidavit received new information which was imparted to his attorneys in substantiation of the facts set forth in the affidavit of bias and prejudice, and this was held sufficient to justify the filing of the affidavit after the term of court had commenced. The case was determined entirely upon the basis of the particular facts surrounding a criminal trial and are not applicable to this case in any way.

Petitioner also cites *Nations v. United States,* 14 Fed. (2d) 507, in support of his petition. In that case an affidavit of bias and prejudice was filed and held sufficient, but the Circuit Court of Appeals specifically stated on page 509 as follows:

> "With these rulings in mind, let us examine the affidavit in the case at bar. It was made by a party to the action. It was not made and filed ten days before the beginning of the term of court but good cause was shown for such failure. The trial had not

> commenced. Delay of the trial was not involved for the trial was postponed by the court of its own motion for more than thirty days after the filing of the affidavit."

We do not review the remaining cases cited by petitioner's counsel for they are not important in determining the issues of this case. The brief of petitioner is very largely based on colloquies between the Trial Judge and general counsel for petitioner, by which petitioner attempts to convince this Court that the Trial Judge was prejudiced against the petitioner because he expressed dissatisfaction with the tactics of counsel in attempting to stall the trial of the case.

V.

CONCLUSION

At the hearing on July 7, 1941 (230), Judge Picard very aptly said:

> "This Court is convinced that the plaintiff in this case is not desirous of trying out the merits of the case; that he has purposely instituted an action against his own brothers and has kept the firm known as the Lansing Drop Forge Company in a turmoil for five or six years, and that it was time that somebody stepped in and put an end to this practice, especially when the country, the United States of America, is engaged upon defense work and the Court being informed that the Lansing Drop Forge Company is also engaged in defense work."

Since the granting of the original restraining orders in this case, petitioner has rested on these orders and has prevented any meetings of stockholders for any purpose whatsoever, and has prevented directors from taking any action except in the ordinary and usual course of business. By means of these restraining orders, he has for a period

of over six years prevented the payment of cumulative preferred dividends, has prevented all plant expansion which was badly needed to meet the necessities of the business of the respondent Corporation, and has prevented the payment of any bonuses to the officers entitled thereto, and prevented the raising of salaries which were very low, as it has always been the policy of the Company to pay low salaries and compensate for services rendered by payment of bonuses in prosperous years. As a result, the individual respondents have not received, for a period of six years, compensation for services performed to which they were properly entitled. At the same time it must be pointed out that the petitioner conducts a business under the name of the Alleghany Forging Company, which is in competition with the Lansing Drop Forge Company, and petitioner contacts prospective and old customers of the Lansing Drop Forge Company and prejudices its business by informing such customers that the Lansing Drop Forge Company is in serious litigation in the Federal Court, and this has resulted in numerous failures on the part of the Lansing Drop Forge Company to secure business which it otherwise would have secured (158).

Respondents contend that the writ of certiorari should be denied.

Respectfully submitted,

ALVA M. CUMMINS,
Capitol Savings & Loan Building,
Lansing, Michigan.

RAYMOND K. DYKEMA,
2746 Penobscot Building,
Detroit, Michigan.

Counsel for Respondents.